12BD, CLOSED, PRETRL

U.S. District Court
District of New Jersey [LIVE] (Newark)
CIVIL DOCKET FOR CASE #: 2:98-cv-01539-NHP

800 SERVICES, INC. v. AT&T CORP.
Assigned to: Judge Nicholas H. Politan
Demand: $0
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 04/06/1998
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

800 SERVICES, INC.

represented by **JOHN J. MURRAY, JR.**
THE LAW OFFICES
OF LAWRENCE S. COVEN
314 U.S. Highway 22 West
Suite E
Green Brook, NJ 08812
(732)424-1000
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

LAWRENCE S. COVEN
COVEN & DeTORRES, ESQS.
314 US HIGHWAY 22 WEST
SUITE E
GREEN BROOK, NJ 08812
(732) 424-1000
TERMINATED: 01/29/1999
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

AT&T CORP.
a New York corporation

represented by **FREDERICK LEE WHITMER**
BROWN, RAYSMAN, MILLSTEIN,
FELDER & STEINER, LLP
900 THIRD AVENUE
NEW YORK, NY 10022-4728
(212) 895-2593
Email: fwhitmer@brownraysman.com
LEAD ATTORNEY
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12BD, ADMCLOSED

U.S. District Court
District of New Jersey [LIVE] (Newark)
CIVIL DOCKET FOR CASE #: 2:95-cv-00908-NHP

COMBINED COMPANIES, et al v. AT&T CORP.
Assigned to: Judge Nicholas H. Politan
Demand: $0
Cause: 28:1331 Fed. Question: Breach of Contract

Date Filed: 02/24/1995
Jury Demand: Defendant
Nature of Suit: 190 Contract: Other
Jurisdiction: Federal Question

Plaintiff

COMBINED COMPANIES, INC.
a Florida corporation

represented by **PETER JOSEPH PIZZI**
CONNELL FOLEY, LLP
85 LIVINGSTON AVENUE
ROSELAND, NJ 07068-1765
(973) 535-0500
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ATTORNEY TO BE NOTICED

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GREEN BROOK, NJ 08812
(732)424-1000

Plaintiff

WINBACK & CONSERVE PROGRAM, INC.

represented by **FRANK P. ARLEO**
ARLEO& DONOHUE, L.L.C.
622 EAGLE ROCK AVENUE
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(732)424-1000
TERMINATED: 05/06/2005
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PETER JOSEPH PIZZI
(See above for address)
TERMINATED: 10/27/1997
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

ONE STOP FINANCIAL, INC.

represented by **FRANK P. ARLEO**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

LAWRENCE S COVEN
(See above for address)
TERMINATED: 05/06/2005
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PETER JOSEPH PIZZI
(See above for address)
TERMINATED: 10/27/1997
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

800 DISCOUNTS, INC.
New Jersey corporations

represented by **FRANK P. ARLEO**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

LAWRENCE S COVEN
(See above for address)
TERMINATED: 05/06/2005
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PETER JOSEPH PIZZI

(See above for address)
TERMINATED: 10/27/1997
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC.
a Pennsylvania corporation
TERMINATED: 03/27/1995

represented by **FRANK P. ARLEO**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

GROUP DISCOUNTS, INC.

represented by **FRANK P. ARLEO**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

LAWRENCE S COVEN
(See above for address)
TERMINATED: 05/06/2005
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PETER JOSEPH PIZZI
(See above for address)
TERMINATED: 10/27/1997
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

AT&T CORP.
a New York corporation

represented by **RICHARD H. BROWN**
PITNEY, HARDIN, KIPP & SZUCH, LLP
P.O. BOX 1945
MORRISTOWN, NJ 07962-1945
(973) 966-6300
Email: rbrown@pitneyhardin.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Counter Claimant

AT&T CORP.

represented by **RICHARD H. BROWN**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/24/1995	1	COMPLAINT filed w/Certificate of Service FILING FEE $120.00 RECEIPT #198264 (dr) Modified on 03/01/1995 (Entered: 02/27/1995)
02/24/1995	2	NOTICE 0F APPLICATION, BY PLTF'S, FOR AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS AND MOTION FOR PRELIMINARY INJUNCTION (dr) Modified on 02/27/1995 (Entered: 02/27/1995)
02/24/1995	3	AFFIDAVIT of ALFONSE INGA Re: In Support of Pltf's Application for an OTSC w/Temp Restraints. (dr) (Entered: 02/27/1995)
02/24/1995	4	AFFIDAVIT of PATRICK BELLO Re: In Support of Pltf's OTSC w/Temp Restraints (dr) Modified on 02/27/1995 (Entered: 02/27/1995)
02/24/1995	5	AFFIDAVIT of LARRY G. SHIPP Re: In Support of Pltf's Application For An OTSC w/Temp Restraints (dr) (Entered: 02/27/1995)
02/24/1995	6	CERTIFICATION of LAWRENCE S. COVEN (dr) Modified on 03/02/1995 (Entered: 02/27/1995)
02/24/1995	7	NOTICE of Allocation and Assignment filed. Magistrate RONALD J. HEDGES (dr) Modified on 03/02/1995 (Entered: 02/27/1995)
03/07/1995	9	AFFIDAVIT OF FREDERICK L. WHITMER (femp) (Entered: 03/09/1995)
03/07/1995	10	CERTIFICATION of JOSEPH FITZPATRICK (femp) (Entered: 03/09/1995)
03/08/1995	13	Notice of MOTION to dismiss action by AT&T CORP. proof of service. Motion hearing set for 3/21/95 on [13-1] motion . (nr) (Entered: 03/10/1995)
03/09/1995	11	CERTIFICATION of RICHARD R. MEADE (femp) (Entered: 03/09/1995)
03/09/1995	12	CERTIFICATION of THOMAS UMHOLTZ (femp) (Entered: 03/09/1995)
03/10/1995	14	Minute entry: Proceedings recorded by Ct-Reporter: Stanley Rizman; Minutes of: 03.08.95; The following actions were taken, Hrg. on pltf's motion for TRO. Ordered hrg. carried to Tuesday, March 21, 1995. By Judge Nicholas H. Politan (nr) (Entered: 03/10/1995)
03/13/1995	15	CERTIFICATE OF SERVICE of copies of brief in opposition (nr) (Entered: 03/15/1995)
03/14/1995	16	CERTIFICATION of ALFONSE G. INGA (nr) (Entered: 03/15/1995)
03/14/1995	17	CERTIFICATION of Lawrence S. Coven (nr) (Entered: 03/15/1995)
03/14/1995	18	CERTIFICATE OF SERVICE of copies of certificatons & supplemental joint brief (nr) (Entered: 03/15/1995)

03/14/1995	19	Substitute attorney for COMBINED COMPANIES ; Terminated attorney LAWRENCE S. COVEN for COMBINED COMPANIES ; Added, RICHARD C YESKOO (nr) (Entered: 03/15/1995)
03/20/1995	20	CERTIFICATION of CARL WILLIAMS in opposition to the motion for a preliminary injunction against AT&T (femp) (Entered: 03/22/1995)
03/20/1995	21	CERTIFICATION of RICHARD HIGGINSON in opposition to the motion for a preliminary injunction against AT&T (femp) (Entered: 03/22/1995)
03/20/1995	22	CERTIFICATE OF SERVICE of copies of AT&T's Supplemental Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Certification of CARL WILLIAMS, and Certification of RICHARD HIGGINSON (femp) (Entered: 03/22/1995)
03/21/1995	23	Minute entry: Proceedings recorded by Ct-Reporter: Stanley Rizman; Minutes of: 03.21.95; The following actions were taken, Settlement Conference. Hrg. on pltf's application for preliminary injunction. Ordered hrg. adjourned until Thurs. 3-23-95. By Judge Nicholas H. Politan (nr) (Entered: 03/23/1995)
03/23/1995	24	Minute entry: Proceedings recorded by Ct-Reporter: Stanley Rizman; Minutes of: 03.23.95; The following actions were taken, Continued hrg. on pltf's application for preliminary injunction. Hrg. on defts. application for directed verdict. Ordered application denied. Ordered counsel to submit post hrg. memos by 3-30-95. Ordered hrg. adjourned to 3:15p.m. By Judge Nicholas H. Politan (nr) (Entered: 03/27/1995)
03/24/1995	25	STIPULATION AND ORDER, dismissing action as to pltf. Public Service Enterprises of Pennsylvania, Inc. (signed by Judge Nicholas H. Politan) n.m (nr) (Entered: 03/27/1995)
03/30/1995	26	CERTIFICATE OF SERVICE of copies of closing summation in support of motion for mandatory preliminary injunction (nr) (Entered: 04/03/1995)
03/31/1995	27	Substitute attorney for PUBLIC SERVICE ; Terminated ; Added, RICHARD C YESKOO (nr) (Entered: 04/03/1995)
03/31/1995	28	SUPPLEMENTAL CERTIFICATION *** (nr) (Entered: 04/07/1995)
04/11/1995	29	CERTIFICATION of LARRY G. SHIPP (nr) (Entered: 04/12/1995)
04/17/1995	30	CERTIFICATION of IRA SARBONE (nr) (Entered: 04/19/1995)
04/17/1995	31	CERTIFICATION of JOSEPH KEARNEY (nr) (Entered: 04/19/1995)
05/19/1995	32	LETTER OPINION (Copy to NJLJ) (signed by Judge Nicholas H. Politan) (nr) (Entered: 05/23/1995)
05/19/1995	33	ORDER directing AT&T to provide full service on the CSTP II Plan No.'s 1351, 1583, 2430, 2828, 2829, 3124, 3468 , 3524 and 3663, pending hrg. on preliiminary injunction and directing that within 10 days the sum of one hundred thousand be posted (signed by Judge Nicholas

		H. Politan) (nr) (Entered: 05/23/1995)
06/02/1995	34	ORDER appointing H. Curtis Meanor, Esq and Jeffrey M. Schwartz, Esq. escrow agents to hold the $100,000.00 deposit in a 30 day interest bearing account; the deposition of said fund is subject to further order of this Court. (signed by Judge Nicholas H. Politan) n/m (jd) (Entered: 06/07/1995)
06/16/1995	35	NOTICE OF APPEAL filed at 11:35a.m. by AT&T CORP. Re: [33-1] order. Fee Status: $105.00. Copies of notice of appeal sent to USCA and Attorney(s): LAWRENCE S. COVEN, FREDERICK LEE WHITMER, RICHARD C YESKOO (nr) (Entered: 06/16/1995)
06/29/1995	36	Transcript Purchase Order RE: [35-1] appeal - already on file (nr) (Entered: 06/30/1995)
06/30/1995		Record complete for purposes of appeal. (nr) (Entered: 06/30/1995)
07/03/1995	37	NOTICE of Docketing ROA from USCA Re: [35-1] appeal USCA NUMBER: 95-5437 (femp) (Entered: 07/03/1995)
07/27/1995	38	Notice of MOTION for reconsideration of order dated 5-1-95 by WINBACK & CONSERVE, proof of service. Motion hearing set for 9/11/95 on [38-1] motion . (Brief/PO Subm) (nr) (Entered: 07/28/1995)
09/08/1995	39	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 09/08/95 The following actions were taken, [38-1] motion for reconsideration of order dated 5-1-95 taken under advisement pursuant to Rule 78. By Judge Nicholas H. Politan (nr) (Entered: 09/11/1995)
10/11/1995	40	CERTIFICATION of ALFONSE INGA (nr) (Entered: 10/12/1995)
11/01/1995	41	CERTIFICATION of RICHARD R. MEADE (nr) (Entered: 11/02/1995)
11/15/1995	42	Minute entry: Proceedings recorded by Ct-Reporter: Stanley Rizman; Minutes of: 11.15.95; The following actions were taken, setting motion hearing on [38-1] motion for reconsideration of order dated 5-1-95 by WINBACK & CONSERVE for <date not set>, until further order of Court. Counsel to contact Court. Ordered all submissions due by Nov. 27, 1995. By Judge Nicholas H. Politan (nr) (Entered: 11/17/1995)
11/27/1995	44	Certified Copy Of Order from the USCA dismissing appeal pursuant to F.R.C.P. 42(b) (nr) (Entered: 11/30/1995)
11/28/1995	43	AFFIDAVIT of RICHARD H. BROWN, III (nr) (Entered: 11/29/1995)
11/28/1995	49	SECOND SUPPLEMENTAL CERTIFICATION of CARL WILLIAMS (nr) (Entered: 12/12/1995)
11/28/1995	50	SECOND SUPPLEMENTAL CERTIFICATION of RICHARD R. MEADE (nr) (Entered: 12/12/1995)
11/29/1995	45	AFFIDAVIT of ALFONSE G. INGA (nr) (Entered: 12/01/1995)
11/29/1995	46	CERTIFICATION of THOMAS T. TAMLYN, JR. (nr) (Entered:

		12/01/1995)
12/01/1995	47	CERTIFICATION of ALFONSE G. INGA (nr) (Entered: 12/04/1995)
12/04/1995	48	CERTIFICATION of THOMAS T. TAMLYN, JR. (nr) (Entered: 12/05/1995)
01/23/1996	51	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 01.23.96; The following actions were taken, Continued hrg. motion for preliminary injunction By Judge Nicholas H. Politan (nr) Modified on 01/24/1996 (Entered: 01/24/1996)
01/29/1996	52	CERTIFICATION of ROBERT COLLETTI (nr) (Entered: 01/30/1996)
02/26/1996	53	CERTIFICATION of ROBERT COLLETT (nr) (Entered: 03/05/1996)
03/05/1996	54	LETTER OPINION (Copy to NJLJ) (signed by Judge Nicholas H. Politan) (nr) (Entered: 03/08/1996)
03/05/1996	55	ORDER granting [38-1] motion for reconsideration of order dated 5-1-95 and directing that a bond be posted in sum of $100,000.00 dollars, etc. (signed by Judge Nicholas H. Politan) (nr) (Entered: 03/08/1996)
03/07/1996	56	CERTIFICATION of ALFONSE G. INGA Re: conversation w/AT&T Specialized Markets (DD) (Entered: 03/11/1996)
03/14/1996	57	Notice of MOTION to stay enforement of the 3-5-96 preliminary injunction by AT&T CORP. proof of service. Motion hearing set for 3/21/96 on [57-1] motion . (Brief/PO Subm) (nr) (Entered: 03/19/1996)
03/20/1996	58	LETTER By GROUP DISCOUNTS, INC w/attached fax copy of certification of Alfonse G. Inga re: mot. of AT&T Corp. to stay order of 3/5/96.(brief sub.) (mn) (Entered: 03/21/1996)
03/20/1996	59	CERTIFICATE OF SERVICE of plas' brief in opp to AT& T motion to stay enforcement by COMBINED COMPANIES (ar) (Entered: 03/21/1996)
03/25/1996	60	Minute entry: Proceedings recorded by Ct-Reporter: Stanley Rizman; Minutes of: 03.25.96; The following actions were taken, denying [57-1] motion to stay enforement of the 3-5-96 preliminary injunction By Judge Nicholas H. Politan (nr) (Entered: 03/27/1996)
03/25/1996	61	ORDER denying [57-1] motion to stay enforement of the 3-5-96 preliminary injunction (signed by Judge Nicholas H. Politan) (nr) (Entered: 03/27/1996)
03/26/1996	63	NOTICE OF APPEAL filed at 10:00 by AT&T CORP. Re: [61-1] order . Fee Status: $105.00. Copies of notice of appeal sent to USCA and Attorney(s): LAWRENCE S. COVEN, FREDERICK LEE WHITMER, RICHARD C YESKOO (nr) (Entered: 04/01/1996)
03/29/1996	62	NOTICE of Docketing ROA from USCA Re: USCA NUMBER: 6-5185 (dr) (Entered: 03/29/1996)

04/01/1996	65	Substitute attorney for WINBACK & CONSERVE, ONE STOP FINANCIAL, 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC ; Terminated attorney LAWRENCE S. COVEN for GROUP DISCOUNTS, INC, attorney LAWRENCE S. COVEN for 800 DISCOUNTS, INC., attorney LAWRENCE S. COVEN for ONE STOP FINANCIAL, attorney LAWRENCE S. COVEN for WINBACK & CONSERVE ; Added, H. CURTIS MEANOR (nr) (Entered: 04/10/1996)
04/03/1996	64	Certified Copy Of Order from the USCA staying the order of 3-5-96 until further order of this court, etc. (nr) (Entered: 04/08/1996)
04/08/1996	66	Transcript Purchase Order RE: [63-1] appeal - Already on file (nr) (Entered: 04/10/1996)
04/10/1996		Record complete for purposes of appeal. (nr) (Entered: 04/10/1996)
04/26/1996		Record complete for purposes of appeal. (femp) (Entered: 04/26/1996)
06/27/1996	67	CERTIFIED COPY OF OPINION from USCA (nr) (Entered: 06/28/1996)
06/27/1996	68	ORDER on Mandate from USCA reversing and remanding the order entered on 3-8-96 granting a preliminary injunction (nr) (Entered: 06/28/1996)
08/12/1996	69	ORDER for Administrative Termination. (Signed by Judge Ronald J. Hedges) (nr) Modified on 08/14/1996 (Entered: 08/13/1996)
01/09/1997	70	Notice of MOTION for leave to file supplemental complt. by WINBACK & CONSERVE, ONE STOP FINANCIAL, 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC, proof of service. Motion hearing set for 2/10/97 on [70-1] motion . (Ltr. Brief/PO Subm) (nr) (Entered: 01/10/1997)
02/07/1997	71	NOTICE of attorney appearance for 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE by PETER JOSEPH PIZZI (bl) (Entered: 02/11/1997)
02/10/1997	72	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 02.10.97; The following actions were taken, granting [70-1] motion for leave to file supplemental complt. By Mag. Judge Ronald J. Hedges (nr) (Entered: 02/20/1997)
02/24/1997	73	ORDER granting [70-1] motion for leave to file supplemental complt. (signed by Mag. Judge Ronald J. Hedges) (nr) (Entered: 02/25/1997)
02/27/1997	74	ORDER granting [70-1] motion for leave to file supplemental complt. and staying matter pending final deposition of pending matter with Federal Communications Commissions (signed by Mag. Judge Ronald J. Hedges) (nr) (Entered: 03/03/1997)
03/04/1997	75	AMENDED COMPLAINT by GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE , amending [1-1] complaint (nr) (Entered: 03/06/1997)

03/13/1997	76	ORDER vacating orders filed on Feb. 24 & 26 and granting pltf's leave to a supplemental complt. within 10 days (signed by Mag. Judge Ronald J. Hedges) (nr) (Entered: 03/14/1997)
05/02/1997	77	ANSWER to Complaint; jury demand and COUNTERCLAIM by AT&T CORP. (nr) (Entered: 05/05/1997)
05/22/1997	78	ANSWER by 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE to counterclaim (nr) (Entered: 05/23/1997)
06/05/1997	79	ANSWER by COMBINED COMPANIES to [77-2] counterclaim (nr) (Entered: 06/09/1997)
06/17/1997	80	STIPULATION AND ORDER, extending time , setting answer due for 6/5/97 for AT&T CORP. (signed by Judge Nicholas H. Politan) (nr) (Entered: 06/19/1997)
08/08/1997	81	STIPULATION and ORDER, dismissing action w/prejudice and w/out costs (signed by Judge Nicholas H. Politan) (jd) (Entered: 08/11/1997)
10/27/1997	82	Substitute attorney for 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE ; Terminated attorney H. CURTIS MEANOR for WINBACK & CONSERVE, attorney PETER JOSEPH PIZZI for WINBACK & CONSERVE, attorney H. CURTIS MEANOR for ONE STOP FINANCIAL, attorney PETER JOSEPH PIZZI for ONE STOP FINANCIAL, attorney H. CURTIS MEANOR for GROUP DISCOUNTS, INC, attorney PETER JOSEPH PIZZI for GROUP DISCOUNTS, INC, attorney H. CURTIS MEANOR for 800 DISCOUNTS, INC., attorney PETER JOSEPH PIZZI for 800 DISCOUNTS, INC. ; Added, LAWRENCE S. COVEN (nr) (Entered: 11/13/1997)
02/13/1998	83	Notice of MOTION for leave to file amend complt. by 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE, proof of service. Motion hearing set for 3/9/98 on [83-1] motion . (Brief Subm) (nr) (Entered: 02/17/1998)
02/13/1998	84	CERTIFICATION of LAWRENCE S. COVEN on behalf of 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE Re: [83-1] motion for leave to file amend complt. (nr) (Entered: 02/17/1998)
03/09/1998	86	Minute entry: Proceedings recorded by Ct-Reporter: none; Minutes of: 03.09.98; The following actions were taken, [83-1] motion for leave to file amend complt. taken under advisement, rule 78 By Mag. Judge Ronald J. Hedges (nr) (Entered: 03/16/1998)
03/10/1998	85	ORDER denying [83-1] motion for leave to file amend complt. (signed by Mag. Judge Ronald J. Hedges) (nr) (Entered: 03/11/1998)
05/11/1998	87	Notice of Intent to submit a Dispositive motion by 800 DISCOUNTS,

		INC., GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE (nr) (Entered: 05/12/1998)
05/15/1998	88	Substitute attorney for 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC, ONE STOP FINANCIAL, WINBACK & CONSERVE ; Terminated ; Added, Lawrence S. Coven (nr) (Entered: 05/18/1998)
06/24/1998	89	Letter Order denying motion to vacate orders staying proceedings and for summary judgment (signed by Judge Nicholas H. Politan) (nr) (Entered: 06/24/1998)
11/18/2003	90	LETTER by pltf. with attached certification of records filed in Washington (nr) (Entered: 11/20/2003)
01/21/2004	92	NOTICE of Appearance by PETER JOSEPH PIZZI on behalf of 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC., ONE STOP FINANCIAL, INC., WINBACK & CONSERVE PROGRAM, INC. (nr,) (Entered: 02/02/2004)
01/26/2004	91	LETTER ORDER granting pltf's application to reopen action. Signed by Judge William G. Bassler on 01/26/04. (nr,) (Entered: 02/02/2004)
01/30/2004	95	Letter from Richard H. Brown, Esq. on behalf of deft's in opposition to Plaintiff's 1/20/04 letter. (Attachments: #(1) Exhibit A #(2) Exhibit B # (3) Exhibit C #(4) Exhibit D #(5) Exhibit E #(6) Exhibit F #(7) Exhibit G #(8) Exhibit H) received in chambers on 1/30/04 & sent to clerk's office for docketing on 2/11/04.(spc,) (Entered: 02/11/2004)
02/05/2004	96	Letter from Richard H. Brown, Esq. on behalf of Deft's in further opposition to Pltf's 1/20/04 letter & Court's 1/26/04 Order. Original letter received in chambers on 2/5/04 & sent to clerk for docketing on 2/11/04. (spc,) (Entered: 02/11/2004)
02/06/2004	93	Letter from Peter J. Pizzi and Thomas A. Sparno. (PIZZI, PETER) (Entered: 02/06/2004)
02/11/2004	94	Minute Entry for proceedings held before Judge William G. Bassler : Telephone Conference held on 2/11/2004. (Court Reporter Lynn Johnson.) (spc,) Modified on 2/11/2004 (spc,). The date of Mag. Hedges Admin. Term Order is 8-12-96 not 8-26-96. (Entered: 02/11/2004)
02/11/2004	97	ORDER vacating order entered on 1/26/04 and placing this matter back on Administrative Termination. Signed by Judge William G. Bassler on 02/11/04. (nr,) (Entered: 02/13/2004)
07/12/2004	98	Request for hrg. on March 1997 supplemental complt. or primary jurisdiction referral order to obtain a declaratory ruling regarding March 1997 supplemental complt. (nr,) (Entered: 08/05/2004)
07/21/2004	104	Letter in response from AT&T re Mr. Inga letter. (mn,) (Entered: 09/02/2004)
07/23/2004	99	MOTION to Vacate stay of the March 1997 supplemental complt. . (Attachments: # 1 P/O)(nr,) (Entered: 08/05/2004)

07/23/2004		Set Deadlines as to 99 MOTION to Vacate. Motion Hearing set for 9/13/2004 10:00 AM before Judge William G. Bassler. (nr,)(PLEASE BE ADVISED THAT THIS MOTION WILL BE DECIDED ON THE PAPERS UNLESS OTHERWISE NOTIFIED BY THE COURT) (Entered: 08/05/2004)
07/23/2004	100	RESPONSE of Alfonse G. Inges to AT&T;s July 20, 2004 letter (nr,) (Entered: 08/05/2004)
07/23/2004	105	Letter in response from pltfs. re Mr. Inga. (mn,) (Entered: 09/02/2004)
08/05/2004	106	Letter in response from Richard Brown re Mr. Inga. (mn,) (Entered: 09/02/2004)
08/09/2004	101	Letter from Alfonse G. Inga addressing the three letters from AT&T. (nr,) (Entered: 08/12/2004)
08/09/2004	102	Letter from Alfonse G. Inga in response to AT&T's Aug. 5th letter (nr,) (Entered: 08/12/2004)
08/23/2004	103	Letter from Alfonse G. Inga in response to AT&T's letter from Jan. 20, 2004 (nr,) (Entered: 08/26/2004)
09/02/2004	107	LETTER ORDER denying 99 Motion to Vacate . Signed by Judge William G. Bassler on 9/2/04. (sr,) (Entered: 09/03/2004)
09/27/2004	109	Letter from Alfonse Inga requesting that the Court make a determination of the relief sought in the pltf's motion for reconsideration (nr,) (Entered: 10/14/2004)
10/12/2004	108	LETTER ORDER DENYING pltf's request to renew its motion to vacate stay . Signed by Judge William G. Bassler on 10/08/04. (nr,) (Entered: 10/14/2004)
10/13/2004	110	Letter in response to the letter of Sept. 23, 2004 re motion for stay (nr,) (Entered: 10/14/2004)
10/13/2004	111	Substitution of Attorney - Attorney JANET B. COVEN for ONE STOP FINANCIAL, INC.; WINBACK & CONSERVE PROGRAM, INC.; 800 DISCOUNTS, INC. and GROUP DISCOUNTS, INC. added. Attorney PETER JOSEPH PIZZI terminated.. (nr,) (Entered: 10/15/2004)
10/13/2004	112	MOTION to Vacate the stay of the March 1997 supplemental complt. by 800 DISCOUNTS, INC., COMBINED COMPANIES, INC., GROUP DISCOUNTS, INC., ONE STOP FINANCIAL, INC., WINBACK & CONSERVE PROGRAM, INC.. (Attachments: # 1 Certf. of Alfonse G. Inga# 2 P/O)(nr,) Modified on 10/21/2004 (nr,). (Motion assign to Judge Bassler) Modified on 10/28/2004 (nr,). (Entered: 10/15/2004)
10/13/2004		Set Deadlines as to 112 MOTION to Vacate. Motion Hearing set for 11/12/2004 10:00 AM before Judge Nicholas H. Politan. (nr,)(PLEASE BE ADVISED THAT THIS MOTION WILL BE DECIDED ON THE PAPERS UNLESS OTHERWISE NOTIFIED BY THE COURT) (Entered: 10/15/2004)

11/01/2004	113	Letter brief to supplement the notice of motion by Janet B. Coven (nr,) (Entered: 11/04/2004)
11/06/2004	114	Letter from Richard H. Brown in response to application by Pltf. Winback & Conserve Program, Inc., One Stop Financial Inc., Group Discounts, Inc., and 800 Discounts, Inc. to vacate the stay in this matter (nr,) (Entered: 11/10/2004)
03/09/2005	115	Supplemental certification of Alfonse G. Inga on behalf of WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC. Re 112 Motion to Vacate,. (Attachments: # 1 Exhibits to certf.# 2 cont. of exhibits# 3 cont. of exhibits# 4 cont. of exhibits# 5 Cover ltr.)(nr,) (Entered: 03/11/2005)
03/14/2005	116	RESPONSE in Opposition re 112 MOTION to Vacate *Stay* filed by AT&T CORP.. (BROWN, RICHARD) (Entered: 03/14/2005)
03/18/2005	117	Supplemental Certification of Alfonse G. Inga on behalf of COMBINED COMPANIES, INC., WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC. Re 112 Motion to Vacate,. (nr,) Additional attachment(s) added on 3/21/2005 (nr,). (Entered: 03/21/2005)
03/28/2005	118	Supplemental Certification of Alfonse G. Inga (nr,) (Entered: 03/31/2005)
03/31/2005	119	Letter from Richard Brown on behalf of AT&T Corp.. (BROWN, RICHARD) (Entered: 03/31/2005)
04/08/2005	120	Certification of Alfonse G. Inga on behalf of 800 Discounts, Inc., Group Discounts, Inc., Winback & Conserve Program, Inc. and One Stop Financial, Inc. (nr,) (Entered: 04/08/2005)
04/22/2005		Set Deadlines as to 121 MOTION establishing the procedural time frame for this matter. Motion Hearing set for 5/23/2005 10:00 AM before Judge Nicholas H. Politan. (nr,) (PLEASE BE ADVISED THAT THIS MOTION WILL BE DECIDED ON THE PAPERS UNLESS OTHERWISE NOTIFIED BY COURT) (Entered: 04/26/2005)
04/26/2005	121	MOTION establishing the procedural time frame for this matter by WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., 800 DISCOUNTS, INC., GROUP DISCOUNTS, INC.. (Attachments: # 1 Certf of Alfonse G. Inga# 2 P/O)(nr,) (Entered: 04/26/2005)
05/06/2005	122	Substitution of Attorney - Attorney FRANK P. ARLEO and FRANK P. ARLEO for 800 DISCOUNTS, INC.; GROUP DISCOUNTS, INC.; WINBACK & CONSERVE PROGRAM, INC. and ONE STOP FINANCIAL, INC. added. Attorney LAWRENCE S COVEN terminated.. (Attachments: # 1)(ARLEO, FRANK) (Entered: 05/06/2005)
05/06/2005	123	BRIEF in Opposition re 121 MOTION establishing the procedural time frame for this matter filed by AT&T CORP.. (Attachments: # 1 Affidavit of Richard H. Brown)(BROWN, RICHARD) (Entered: 05/06/2005)

05/09/2005	124	LETTER ORDER setting maximum number of pages on all briefs Hearing set for 6/23/2005 10:00 AM before Judge William G. Bassler.. Signed by Judge William G. Bassler on 05/05/05. (nr,) (Entered: 05/10/2005)
05/31/2005	125	MOTION to lift stay by COMBINED COMPANIES, INC., WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., 800 DISCOUNTS, INC., PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., GROUP DISCOUNTS, INC.. (Attachments: # 1 Certf. of Frank P. Arleo# 2 Exhibits to certification# 3 Cont. of exhibits# 4 Cont. of Exhibits# 5 Cont. of Exhibits# 6 Brief# 7 P/O)(nr,) (Entered: 06/06/2005)
05/31/2005		Set Deadlines as to 125 MOTION to lift stay. Motion Hearing set for 6/27/2005 10:00 AM before Judge Nicholas H. Politan. (nr,) (PLEASE BE ADVISED THAT THIS MOTION WILL BE DECIDED ON THE PAPERS UNLESS OTHERWISE NOTIFIED BY THE COURT) (Entered: 06/06/2005)
06/13/2005	126	BRIEF in Opposition re 125 MOTION to lift stay filed by AT&T CORP.. (Attachments: # 1 Affidavit of Richard H. Brown# 2 Affidavit of Richard H. Brown (part II))(BROWN, RICHARD) (Entered: 06/13/2005)
06/27/2005	127	REPLY to Response to Motion re 125 MOTION to lift stay filed by WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., GROUP DISCOUNTS, INC.. (ARLEO, FRANK) (Entered: 06/27/2005)
06/27/2005	128	RESPONSE in Opposition re 125 MOTION to lift stay filed by WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., GROUP DISCOUNTS, INC.. (Attachments: # 1 # 2 # 3 # 4)(ARLEO, FRANK) (Entered: 06/27/2005)

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PACER Login:	ac0164	**Client Code:**	
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Billable Pages:	7	**Cost:**	0.56

CLOSED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS
NICHOLAS H. POLITAN
DISTRICT JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
50 WALNUT ST, ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

NOT FOR PUBLICATION

August 28, 2000

THE ORIGINAL OF THIS LETTER OPINION
IS ON FILE WITH THE CLERK OF THE COURT

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Re: 800 Services, Inc.
v. AT&T Corp.
Civil Action No. 98-1539 (NHP)

Dear Counsel:

This matter comes before the Court on the motion by defendant AT&T Corporation for summary judgment with respect to

the remaining counts of plaintiff 800 Services's Complaint.[1] The Court heard oral argument on February 29, 2000 and April 17, 2000. For the reasons stated herein, the motion by defendant AT&T Corporation for summary judgment is **GRANTED** and the remaining counts of plaintiff's Complaint are hereby **DISMISSED WITH PREJUDICE**. Furthermore, AT&T Corporation is entitled to judgment on its counterclaim in the amount of $1,782,649.60 plus pre-judgment interest. Accordingly, this case is **CLOSED**.

BACKGROUND

Plaintiff 800 Services (hereinafter "800 Services"), a corporation organized under the laws of the State of New Jersey, was engaged in the telecommunications business as an "aggregator" of defendant AT&T Corporation's "800" telecommunications services. See Complaint, ¶¶1, 5-9. As an aggregator, 800 Services subscribed to certain AT&T high-volume discount plans and pooled the usage of its customers to satisfy the minimum volume commitments of the AT&T service plan. See id. 800 Services owned no telecommunications facilities of its own and was AT&T's customer of record for the services to which it subscribed. See id. In turn, the customers whose usage 800

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[1] Counts 1, 2, 3, and 10 of 800 Services's Complaint have previously been dismissed. See Stipulation of Dismissal and Order dated February 5, 1999; Order dated August 12, 1999.

Services aggregated were direct customers of 800 Services, not of AT&T. See id., ¶10.

Defendant AT&T Corporation (hereinafter "AT&T") provides interstate long-distance telecommunications service in competition with MCI, Sprint, and many other long-distance carriers and is a "common carrier" within the meaning of the federal Communications Act of 1934.

Interstate telecommunications carriers are regulated by the ("FCC") pursuant to Title II of the Communications Act of 1934, as amended. See 47 U.S.C. § 201, et seq. (West 2000). Because AT&T provides long distance telecommunications services as a "common carrier" it falls within the purview of the Communications Act. See 47 U.S.C. § 153(10)[2]; 47 U.S.C. § 201, et seq. (West 2000). As such, it is required to provide its services to any person upon reasonable request on terms that are just, reasonable, and nondiscriminatory. See 47 U.S.C. § 201; 47

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[2] According to the Act,

> The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter, but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(10) (West 2000).

U.S.C. § 202(a) (West 2000).

The duties owed by common carriers are regulated through tariffs. Pursuant to § 203, a common carrier such as AT&T, is required to file "schedules" with the FCC, commonly referred to as "tariffs," "showing all charges" for its services and "the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a) (West 2000). See also MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 132 (D.N.J. 1995). Once the tariffs have been filed and permitted by the FCC to become effective, the common carrier is precluded by statute from deviating from the terms of its filed tariffs. According to the statute: "[no] carrier shall . . . extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c) (West 2000). Thus, pursuant to the "filed rate doctrine/filed tariff doctrine," the filed rates are binding on both the carrier and the public. See Marco Supply Co. v. AT&T, 875 F.2d 434, 436 (4th Cir. 1989) (citations omitted). See also See Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 488 (2d Cir. 1998); MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 132 (D.N.J. 1995). Despite the fact that strict adherence to the filed rate/filed tariff doctrine oftentimes produces harsh results, it is the operative doctrine

to be applied by the courts. See Fax Telecommunicaciones, Inc. v. AT&T, 952 F. Supp. 946 (E.D.N.Y. 1996), aff'd, 138 F.3d 479 (2d Cir. 1998).

In 1991, the FCC adopted rules and regulations authorizing carriers to establish "contract tariffs" with their customers. See Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 482 (2d Cir. 1998) (citing In the Matter of Competition in the Interstate Interexchange Marketplace, 6 F.C.C.R. 5880 (1991) (hereinafter "Interstate Interexchange Marketplace"); on reconsideration, 6 F.C.C.R. 7569 (1991); on further reconsideration, 7 F.C.C.R. 2677 (1992), on further reconsideration, 10 F.C.C.R. 4562 (1995)). A contract tariff contains individually negotiated and tailored services arrangements reached between a common carrier and its customer. See Telecom International America, Ltd. v. AT&T Corp., 67 F. Supp.2d 189, 196 n.4 (S.D.N.Y. 1999); National Communications Association, Inc. v. American Telephone & Telegraph Co., No. 92 Civ. 1735, 1998 WL 118174 *27 n.31 (S.D.N.Y. March 16, 1998). The rules and regulations surrounding contract tariffs were designed to "increase flexibility for customers and promote competition among carriers." Fax Telecommunicaciones, 138 F.3d at 482.

In Fax Telecommunicaciones, the United States Court of Appeals for the Second Circuit explained the process whereby contract tariffs become effective. First, "[a]t least one

customer must enter into a contract with the carrier pursuant to the new tariff in order for the carrier to file the contract tariff." Id. (citing 47 C.F.R. § 61.3(m)). Furthermore, the contract tariff must be filed at least fourteen days prior to the effective date of the contract and must include "the terms of the contract, a description of the services to be provided, the price for these services, the minimum volume commitments for each service, any volume discounts, as well as other classifications, practices, and regulations affecting the contract rate thereby complying with the filing requirements of 47 U.S.C. §203(a)." Id. (citing Interstate Interexchange Marketplace at ¶¶91, 121, 122). Upon expiration of the fourteen days, the contract tariff is effective so long as neither the FCC nor any member of the public objects. Id. (citing 47 C.F.R. §§ 61.58(c)(6), 61.42(c)(8)). Finally, in order not to violate the Act's prohibition against discrimination, the carrier must then make the contract tariff generally available to other similarly situated customers. See id. (citing Interstate Interexchange Marketplace at ¶¶91, 129).

In this matter, pursuant to Tariff No. 2, AT&T offered "inbound" or "800" long-distance telecommunications services and certain discount plans for such services, including "Customer Specific Term Plan II" (hereinafter "CSTP II"). AT&T's CSTP II Plan, as set forth in Tariff No. 2, provided for discounted rates and associated promotional discounts and credits in return for a

commitment by the customer to satisfy an annual Minimum Revenue Commitment for the term of the subscription. See Certification of Daniel H. Solomon, Exhibit C. A customer subscribes to AT&T's CSTP II Plan by executing a Network Services Commitment Form. Under the tariff, AT&T bills the aggregator's individual locations for their portion of the usage under the plan. However, Tariff No. 2 provides that AT&T's customer of record (the aggregator in this case) assumes all financial responsibility for all of the designated accounts aggregated under the customer's CSTP II Plan and that, in the event any of these accounts is in default of payment, AT&T will reduce the plan discount payable to the AT&T customer in the amount of that default. See id., Tariff No. 2, §3.3.1.Q.

Tariff No. 2 further provides that the customer will incur "shortfall" charges in the event that it does not satisfy its Minimum Revenue Commitment and "termination" charges if it discontinues service before the completion of the term. See id. Tariff No. 2 also provides that, in the event any shortfall or termination charges are incurred under a CSTP II Plan, such charges shall be apportioned among the accounts aggregated under the plan according to usage and billed to the individual aggregated locations designated by the customer. See id.

STATEMENT OF FACTS

800 Services subscribed to inbound service offered by AT&T pursuant to Tariff No. 2 from 1990 through 1994. However, the allegations of the Complaint concern service to which 800 Services subscribed after August 1, 1994.

On or about July 22, 1994, Phillip Okin (hereinafter "Okin"), President of 800 Services, executed a Network Services Commitment Form for AT&T's CSTP II Plan. See Certification of Daniel H. Solomon, Exhibit D. This form expressly provides:

> [t]he service(s) and pricing plan(s) you have selected will be governed by the rates and terms and conditions in the appropriate AT&T tariffs as may be modified from time to time. Your signature acknowledges that you understand the terms and conditions under which the service(s) selected will be provided and that you are duly authorized to make the commitment(s) and to order service for each of these locations.

See id.

On August 2, 1994, Scott Landon, on behalf of AT&T, executed the Network Services Commitment Form. See id. Pursuant to this subscription, 800 Services agreed to an annual Minimum Revenue Commitment of $3 million in services per year for three years. The effective date of this subscription was August 1, 1994. See id.

During his deposition, Okin testified that, in or about Fall 1994, his business began declining. See Deposition of Phillip Okin at page 50, lines 11-13. In or about November to December

1994, 800 Services discontinued adding new customers to its CSTP Plan. See Okin Dep. at page 144, lines 5-11.

At some point shortly thereafter, 800 Services was unable to meet its minimum revenue commitment under its CSTP Plan for the first year of the third-year term. See Okin Dep. at page 139, lines 1-11. The record reveals that Okin then embarked upon a series of "strategies" seemingly aimed at avoiding the shortfall charges which, incidentally, Okin believed he did not have to pay. See Okin Dep. at page 166, lines 3-10. The first strategy was to request that AT&T extend the term of its commitment under its August 1, 1994 plan pursuant to Section 2.5.7 of Tariff No. 2.[3] See Solomon Cert., Exhibit F. 800 Services asserted that it qualified for an extension under the terms of the tariff because AT&T's implementation of an FCC order (which placed a quota on the number of new "800" numbers available to each carrier on a weekly basis) prevented 800 Services from satisfying its minimum revenue commitment. See id.

In responding to Okin's request in a letter dated July 14, 1995, AT&T noted that 800 Services did not show a "cause and affect [sic] relationship between the governmental order that constrains the supply of 800 numbers and 800 Services, Inc.'s

[3] Section 2.5.7 of Tariff No. 2 permits a customer to extend the original term commitment of its tariffed volume discount plan for up to one year if the customer fails or is unable to meet its usage or revenue commitment because of a strike, government order or other such circumstances. See Solomon Cert., Exhibit C.

failure to meet its tariff commitments." See Solomon Cert., Exhibit G. AT&T then requested 800 Services to demonstrate that it already has activated or had firm end-user customer orders to activate all of its currently reserved numbers and that it had firm orders for 800 services from end-user customers under its CSTP II Plan that could not be satisfied due to the unavailability of new numbers. See id. 800 Services submitted no proof to AT&T that it already had activated all of its currently reserved numbers and had firm orders for additional service that could not be met due to the implementation of the FCC quota. See Okin Dep. at 93, line 25; page 94, lines 1-10. In fact, Okin testified that no 800 Services order went unfulfilled because of the FCC "800 number" quota. See Okin Dep. at page 93, lines 17-24.

In or about July 21, 1995, 800 Services then attempted to "restructure" its CSTP II Plan. By letter dated July 25, 1995, AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. See Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if 800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum

innual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. See id. AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. See id. 800 Services never attempted to proceed with this request. See Okin Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. See Okin Dep. at page 134, lines 7-11.

800 Services next contemplated moving certain business traffic from its Tariff No. 2 service to CT 516. Notwithstanding 800 Services's allegations in its Complaint, 800 Services has admitted in discovery that it did not qualify to subscribe directly to CT 516 and that 800 Services never actually submitted an order to AT&T for service to CT 516 or under any other contract tariff or to transfer service from Tariff No. 2 to CT 516. See Okin Dep. at pages 101-105.

Finally, in or around July 28, 1995, 800 Services submitted orders to AT&T to delete all its end-user locations from its CSTP II Plan. See Okin Dep. at page 104. At the time that 800 Services asked to delete all its customers from its plan, 800 Services had no arrangements to transition those customers to any other 800 Services's plan or to any other telecommunications service for inbound 800 service. See Okin Dep., at page 157,

lines 14-22; page 158, lines 22-25; page 159, line 1.

On or about April 1, 1996, AT&T rendered a bill to 800 Services in the amount of $382,651.05 allegedly due and owing for usage charges for inbound telecommunications services provided to 800 Services by AT&T pursuant to Tariff No. 2. See Certification of Naris Sotillo-Sayers, ¶6. In or about May 1, 1996, AT&T rendered a bill to 800 Services in the amount of $1,399,998.68 reflecting the amount allegedly due and owing for shortfall and termination charges because of 800 Services's alleged failure to fulfill the Minimum Revenue Commitment under its CSTP II plan. See id., ¶17. AT&T contends that 800 Services never paid any money to AT&T in satisfaction of the aforementioned bills and that said amounts remain due and owing.

On April 6, 1998, 800 Services filed a Complaint in the United States District Court for the District of New Jersey containing twelve counts.

On June 30, 1998, AT&T filed an Answer and Counterclaim.

DISCUSSION

I. Standard of Review

The standard governing a summary judgment motion is set forth in Fed. R. Civ. P. 56(c), which provides, in pertinent part, that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

> admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(C) (West 2000). A fact is material if it might affect the outcome of the suit under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Procedurally, the movant has the initial burden of identifying evidence that it believes shows an absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When the movant will bear the burden of proof at trial, the movant's burden can be discharged by showing that there is an absence of evidence to support the non-movant's case. See id. at 325. If the movant establishes the absence of a genuine issue of material fact, the burden shifts to the non-movant to do more than "simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In this matter, there are no genuine issues of material fact and therefore, summary judgment is appropriate.

II. Communications Act

Counts Eleven and Twelve of 800 Services's Complaint purport to allege claims arising under §§ 201, 202, and 203 of the Communications Act.

The limitations period governing such claims is found in Section 415(b) of the Act which provides, in pertinent part:

"[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d)[4] of this section." 47 U.S.C. §415(b) (West 2000). This section applies equally to complaints brought in a court of law in addition to those claims filed with the FCC. See Pavlak v. Church, 727 F.2d 1425, 1426-27 (9th Cir. 1984); Ward v. Northern Ohio Tel. Co., 381 F.2d 16 (6th Cir. 1967).

800 Services filed the subject Complaint on April 6, 1998 essentially alleging that AT&T engaged in various violations of the common law and the Communications Act during a period of time beginning in September 1990 and ending no later than July 1995. The service upon which plaintiff bases its Complaint commenced on August 2, 1994, see Complaint, ¶6, and the latest alleged misdeed

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[4] Section 415(d), which provides:

> If on or before expiration of the period of limitation in subsection (b) or (c) of this section a carrier begins action under subsection (a) of this section for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

47 U.S.C. §415(d) (West 2000).

Incidentally, there is no dispute that, based on the facts of this case, this provision does not apply.

AT&T occurred no later than July 1995 when 800 Services uested that its accounts be deleted, see Complaint, ¶16, and ims that it later requested transfer to CT 516, see Complaint, . Based on plaintiff's allegations, the most recent violation urred no later than July 1995, which is more than two years or to the filing of the Complaint.

In response, 800 Services contends that its claims brought rsuant to the Communications Act are not time-barred by the plicable two-year statute of limitations by virtue of the ontinuing wrong" doctrine.

The "continuing wrong" doctrine applies in situations where ere is evidence of continuing **affirmative** wrongful conduct. e 287 Corporate Center Associates v. Township of Bridgewater, 01 F.3d 320, 324 (3d Cir. 1996) (citing Brenner v. Local 514, nited Bhd. of Carpenters and Joiners of Am., 927 F.2d 1283, 1296 3d Cir. 1991) (emphasis added)). 800 Services has failed to llege any facts or establish through discovery any evidence that T&T's alleged wrongful conduct giving rise to the Communications ct claims continued beyond the limitations period. 800 Services erely contends that because AT&T "continues to be unjustly nriched at plaintiff's expense," the continuing wrong doctrine should apply. As stated above, however, the continuing wrong doctrine applies to an affirmative act by the alleged wrongdoer and continuing to be "unjustly enriched" does not qualify as an

affirmative act. Instead, if one becomes "unjustly enriched" it is, most likely, the **result** of an affirmative wrongful act. Because there is no evidence in the record of an affirmative act of wrongdoing by AT&T beyond July 1995, 800 Services's claims in **COUNTS ELEVEN AND TWELVE** of the Complaint for violation of the Communications Act are **DISMISSED WITH PREJUDICE** inasmuch as they are time-barred.

III. Slander and Libel

Counts Five and Six of 800 Services's Complaint purport to allege claims of slander and libel.

N.J.S.A. §2A::14-3 provides:

> Every action at law for libel or slander shall be commenced within 1 year next after publication of the alleged libel or slander.

N.J. STAT. ANN. §2A:14-3 (West 2000).

The latest point in time within which it is alleged that AT&T made slanderous or libelous statements is July 1995. As noted above, plaintiff filed the subject Complaint on April 6, 1998, well over one year after the slanderous and libelous statements allegedly were made by representatives of AT&T. Therefore, **COUNTS FIVE AND SIX** of the Complaint are **DISMISSED WITH PREJUDICE** inasmuch as they are time-barred.

IV. Unjust Enrichment

Count Four of 800 Services's Complaint purports to allege a claim of unjust enrichment. 800 Services contends that AT&T became unjustly enriched at its expense when AT&T utilized 800 Services's proprietary customer lists to derive profits without apportioning the profits. 800 Services also alleges that AT&T wrongfully collected revenue from end-user customers without giving 800 Services its share of the profits.

To state a claim for unjust enrichment, a plaintiff must show "both that defendant received a benefit and that retention of that benefit without repayment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994) (citing Associates Commercial Corp. v. Wallia, 211 N.J. Super. 231, 243 (N.J. Super. Ct. App. Div. 1986); Russell-Stanley Corp. v. Plant Indus., Inc., 250 N.J. Super. 478, 509-510 (N.J. Super. Ct. Ch. Div. 1991)). A plaintiff must show "that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of the remuneration enriched defendant beyond its contractual rights." VRG Corp., 135 N.J. at 555.

The deposition testimony submitted by counsel for 800 Services does not support its allegation that AT&T used proprietary information belonging to 800 Services. Quite simply, there is no first-party testimony that AT&T appropriated 800

Services customers. For example, Okin's testimony reeks with statements amounting to nothing more than mere conjecture. A thorough review of Okin's testimony reveals that he simply made assumptions about AT&T's actions when his business traffic began to decline. In fact, Okin admits that none of the customers who left 800 Services ever advised him that they left as a result of being contacted by AT&T.

Additionally, contrary to what 800 Services would have this Court believe, nothing in Chris Mehlenbacher or Susan Rinaldi's (employees of 800 Services) deposition testimony provides a factual basis for 800 Services's conclusion that AT&T was utilizing its proprietary information. In fact, when questioned about what he knew about a claim that AT&T was misusing plaintiff's proprietary information, Mr. Mehlenbacher testified that: "[i]t was just, let's call it a general buzz in the aggregator industry that they felt that their accounts were being targeted specifically. I don't have a specific conversation that took place." See Deposition of Chris Mehlenbacher at page 89, lines 1-5. Finally, Al Inga's (another aggregator) testimony is based on what information he was given by Okin and other aggregators in the industry. See Deposition of Al Inga at page 32, lines 7-14; page 112-113. See also Okin Dep. at page 244, lines 12-24.

800 Services also alleges that AT&T wrongfully collected

revenue from end-user customers without giving 800 Services its share of the profits. However, 800 Services offers no evidence to support this allegation. Therefore, **COUNT FOUR** of the Complaint is **DISMISSED WITH PREJUDICE.**

V. Intentional Interference with Prospective Economic Advantage and Intentional Interference with Contractual Relations

Counts Seven and Eight of 800 Services's Complaint purport to allege claims of intentional interference with prospective economic advantage and intentional interference with contractual relations.

"An action for tortious interference with prospective business relation protects the right 'to pursue one's business, calling or occupation free from undue influence or molestation.'" Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 750 (1989). "What is actionable is '[t]he luring away, by devious, improper, and unrighteous means, of the customer of another.'" Id.

"The separate cause of action for the intentional interference with a prospective contractual or economic relationship has long been recognized as distinct from the tort of interference with the performance of a contract." Id. (citations omitted). Pursuant to New Jersey law, the elements of

a claim for tortious interference with contract are: "(1) a plaintiff's existing or reasonable expectation of economic advantage or benefit; (2) a defendant's knowledge of the plaintiff's expectancy by the defendant; (3) wrongful and intentional interference with that expectancy by the defendant; (4) a reasonable probability that the plaintiff would have received the anticipated economic advantage absent such interference; and (5) damages resulting from the defendant's interference." Pitak v. Bell Atlantic Network SVCS, Inc., et al., 928 F. Supp. 1354, 1369 (D.N.J. 1996) (citations omitted). Clearly, the linchpin of the analysis is the "wrongfulness" of the actions.

800 Services contends that AT&T wrongfully solicited 800 Services's customers, thereby causing 800 Services's business to decline. Specifically, 800 Services contends that AT&T called 800 Services's customers, offered lower rates than those offered by 800 Services, and told these customers that it would remove any shortfall charges assessed to them if they would switch to AT&T. 800 Services also contends that AT&T tortiously interfered with its business when AT&T refused to allow 800 Services to restructure its plan.[5]

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[5]800 Services proffers many allegations to support its tortious interference claims. However, many of these allegations should have been asserted pursuant to the Communications Act. Since the Court has already determined that any claims brought pursuant to the Communications Act are time-barred, the Court will not

As aforementioned, there is no reliable, first-party testimony in the record that AT&T wrongfully solicited 800 Services's customers. Even assuming that AT&T contacted 800 Services's customers and advised those customers that AT&T disconnected 800 Services, that a customer could complete calls on the AT&T network at AT&T's standard rates, that a customer may also choose any long-distance carrier, and that a customer may want to consider direct service with AT&T as an alternative to no service at all (since Okin testified that there was no alternative plan in place post-deletion), such conduct does not strike this Court as "wrongful" conduct on the part of AT&T. This is because these statements allegedly occurred after 800 Services began defaulting on its payment obligations and, ultimately, placed these customers in the position of having no 800 service plan at all.

Further, 800 Services's allegation that AT&T wrongfully refused its request to restructure is belied by the testimony if its President. The record reveals that AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. See Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if

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address these allegations.

800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum Annual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. See id. AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. See id. 800 Services never attempted to proceed with this request. See Okin Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. See Okin Dep. at page 134, lines 7-11. Therefore, **COUNTS SEVEN** and **EIGHT** of the Complaint are **DISMISSED WITH PREJUDICE.**

VI. Unfair Competition/Trade Libel

Count Nine of 800 Services's Complaint purports to allege claims of unfair competition/trade libel.

In order to prove the tort of trade libel, a plaintiff must establish "the publication, or communication to a third person, of false statements concerning the plaintiff, his property, or his business." Federal Deposit Ins. Corp. v. Bathgate, 27 F.3d 850, 871 (3d Cir. 1994) (citing Henry v. Vaccaro Const. Co. v. A.J. DePace, Inc., 137 N.J. Super. 512 (Law Div. 1975)).

800 Services argues that AT&T told 800 Services's customers that 800 Services was "not responsible in their business matters." See 800 Services's Supplemental Brief at page 11. To support this proposition, 800 Services relies on the testimony of Susan Rinaldi, one of its employees. Contrary to 800 Services's characterization of that testimony, Susan Rinaldi testified that in connection with a discussion of why AT&T allocated shortfall charges to end-user locations, an employee of AT&T named "Vanessa" said: "we told the customers because 800 Services didn't meet their requirement that they're being charged back a penalty." See Deposition of Susan Rinaldi at page 145, lines 1-12. As pointed out by counsel for AT&T, the "requirement" referenced therein is the Minimum Annual Commitment in the tariff which, if not met, gives rise to the imposition of shortfall charges. 800 Services does not dispute that it did not meet the Minimum Annual Commitment and, accordingly, shortfall charges may issue.

In conclusion, 800 Services has not offered any admissible evidence which demonstrates that AT&T made false statements concerning 800 Services, its property or business. Therefore, **COUNT NINE** of the Complaint is **DISMISSED WITH PREJUDICE**.

VII. AT&T's Counterclaim

AT&T has filed a Counterclaim seeking judgment for unpaid usage charges in the amount of $382,651.05 and shortfall charges in the amount of $1,399,998.68 plus pre-judgment interest.

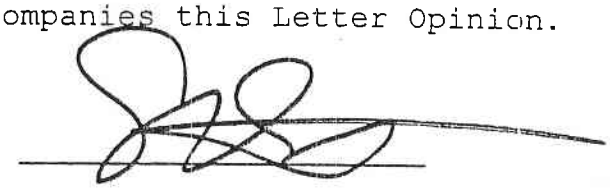
As discussed in greater detail above, the filed tariff controls the parties' rights and liabilities as a matter of law. In this matter, Tariff No. 2 provides that the payment of invoices is due upon presentation. See Certification of Daniel H. Solomon, Exhibit C, Tariff No. 2 § 2.5.3. Pursuant to Tariff No. 2, 800 Services, as a subscriber to AT&T services pursuant to the tariff, is obligated to pay all usage charges accrued for services rendered. Additionally, 800 Services is responsible for shortfall and termination charges in the event that 800 Services fails to satisfy the minimum usage commitments. 800 Services has not submitted payment for any of these charges. The prevailing law entitles AT&T to judgment for these charges.

AT&T has submitted a Certification by Noris Sotillo-Sayers dated December 10, 1999 which certifies that these are the amounts due and owing to AT&T as a result of services provided to 800 Services under the CSTP II Plan. Although 800 Services has contested that it must pay these charges, it does not challenge the amounts as set forth in the Certification.

CONCLUSION

For the foregoing reasons, the motion by defendant AT&T Corporation for summary judgment is **GRANTED** and the remaining counts of plaintiff's Complaint are hereby **DISMISSED WITH PREJUDICE**. Furthermore, AT&T is entitled to judgment on its counterclaim in the amount of $1,782,649.60 plus pre-judgment interest.

An appropriate Order accompanies this Letter Opinion.



NICHOLAS H. POLITAN

U.S.D.J.

ORDERED that AT&T Corporation is entitled to judgment on its counterclaim in the amount of $1,782,649.60 plus pre-judgment interest; and it is further

ORDERED that this case is **CLOSED**.

NICHOLAS H. POLITAN
U.S.D.J.

Counter Claimant

AT&T CORP.

represented by **FREDERICK LEE WHITMER**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/06/1998	1	COMPLAINT filed FILING FEE $ 150.00 RECEIPT # 250776 (dr) (Entered: 04/07/1998)
04/06/1998	2	NOTICE of Allocation and Assignment filed. Magistrate RONALD J. HEDGES (dr) (Entered: 04/07/1998)
04/16/1998		SUMMONS(ES) issued for AT&T CORP. (20 Days) (Mailed to Counsel) (femp) (Entered: 04/16/1998)
05/22/1998	3	APPLICATION by AT&T CORP. and Clerk's Order extending time to answer. Answer due 6/10/98 for AT&T CORP. (femp) (Entered: 05/22/1998)
06/29/1998	4	STIPULATION and ORDER, extending time to answer complaint , resetting answer due for 6/30/98 for AT&T CORP. (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 06/29/1998)
06/30/1998	5	ANSWER to Complaint and COUNTERCLAIM against pla by dft AT&T CORP. w/certsvc. (femp) (Entered: 06/30/1998)
07/13/1998	6	SCHEDULING ORDER, setting scheduling conference for 9/3/98 (signed by Mag. Judge Ronald J. Hedges) (femp) (Entered: 07/14/1998)
07/21/1998	7	REPLY by pla 800 SERVICES, INC. to [5-2] counter claim w/certsvc (femp) (Entered: 07/22/1998)
09/25/1998	8	STIPULATED PROTECTIVE ORDER (signed by Judge Nicholas H. Politan) n/m (femp) (Entered: 09/25/1998)
10/21/1998	9	SCHEDULING ORDER setting Status conference 1/7/99 ; answer to interrogatories by 10/23/98; etc. (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 10/21/1998)
10/21/1998		Deadline updated; setanswers to interrogatories due 12/11/98 (femp) (Entered: 10/21/1998)
01/20/1999	10	ORDER, set answers to interrogatories due 1/29/99 , set telephone conference for 2/8/99 , set status conference for 2/8/99; etc. (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 01/21/1999)

01/28/1999	11	LETTER ORDER, set status conference for 2/8/99; the firm of Coven has been discharged by pla; if new counsel does not appear at status conference it will be recommended that the plas pleadings be stricken and that dft proceed to judgment against pla by way of default judgment (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 01/29/1999)
02/05/1999	12	Notice of Intent to submit a Dispositive motion by dft AT&T CORP. (femp) (Entered: 02/05/1999)
02/05/1999	13	STIPULATION OF DISMISSAL and ORDER, dismissing counts one, two and twelve with prejudice and without costs against either party (signed by Judge Nicholas H. Politan) n/m (femp) (Entered: 02/05/1999)
02/16/1999	14	ORDER, set status conference for 2/17/99; pla's principal to appear; rule 37 sanctions to be considered (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 02/16/1999)
02/22/1999	15	Notice of MOTION for an award of judgment on Cts. 3 and 10 of complaint by dft., AT&T CORP., Motion set for 3/22/99 on [15-1] motion w/certsvc (Brief/PO Subm) (cs) (Entered: 02/22/1999)
02/22/1999	16	AFFIDAVIT of RICHARD H. BROWN w/exhibits on behalf of dft., AT&T CORP. in support of [15-1] motion for an award of judgment on Cts. 3 and 10 of complaint (cs) (Entered: 02/22/1999)
03/22/1999	17	Minute entry: Proceedings recorded by Ct-Reporter: RIZMAN; Minutes of: 03/22/99; The following actions were taken, dismissing without prejudice and with prejudice [15-1] motion for an award of judgment on Cts. 3 and 10 of complaint; ordered counsel to replead case within 20 days By Judge Nicholas H. Politan (femp) (Entered: 03/23/1999)
03/22/1999	18	AFFIDAVIT of SHARON O. GANS (femp) (Entered: 03/23/1999)
03/22/1999	19	AFFIDAVIT of RICHARD H. BROWN (femp) (Entered: 03/23/1999)
03/22/1999	20	ORDER, for SHARON O. GANS to appear pro hac vice (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 03/23/1999)
03/31/1999	21	TRANSCRIPT of Proceedings taken on 03/22/99 (Politan) (femp) (Entered: 03/31/1999)
04/09/1999	22	ORDER granting [15-1] motion for an award of judgment on Cts. 3 and 10 of complaint; dismissing count 10 with prejudice, dismissing count 3 without prejudice; amended complaint to be filed 30 days from the date hereof, etc. (signed by Judge Nicholas H. Politan) n/m (femp) (Entered: 04/09/1999)
04/15/1999	23	ORDER, set status conference for 5/10/99; etc. (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 04/16/1999)

05/10/1999	24	ORDER SETTING CONFERENCE, set pretrial conference for 9/9/99 , amended complaint to be filed by 05/11/99; set answer due for 5/18/99 for AT&T CORP., etc. (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 05/11/1999)
08/12/1999	25	ORDER, dismissing counts 3 and 10 of complaint with prejudice (signed by Judge Nicholas H. Politan) n/m (femp) (Entered: 08/12/1999)
08/13/1999	26	LETTER ORDER, set status conference for 9/13/99, etc. (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 08/13/1999)
09/08/1999	27	ORDER SETTING CONFERENCE, set pretrial conference for 10/26/99 (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 09/08/1999)
11/05/1999	28	FINAL PRETRIAL ORDER filed (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 11/05/1999)
11/30/1999	29	ORDER, denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required to provide a summary of all lay opinion testimony it intends to introduce at trial (signed by Mag. Judge Ronald J. Hedges) n/m (femp) (Entered: 12/01/1999)
12/22/1999	31	Notice of Intent to submit a Dispositive motion by AT&T CORP. (sr) (Entered: 12/28/1999)
12/27/1999	30	Notice of Intent to submit a Dispositive motion by dft AT&T CORP. (femp) (Entered: 12/27/1999)
12/27/1999	32	Notice of MOTION to amend [29-1] order denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required to provide a summary of all lay opinion testimony it intends to introduce at trial by 800 SERVICES, INC., Motion set for 1/25/99 on [32-1] motion . (Brief/PO Subm) (sr) (Entered: 12/28/1999)
12/27/1999	33	CERTIFICATION of John J. Murray, Jr., Esq. on behalf of 800 SERVICES, INC. Re: [32-1] motion to amend [29-1] order denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required to provide a summary of all lay opinion testimony it intends to introduce at trial (sr) (Entered: 12/28/1999)
01/03/2000	34	ORDER denying [32-1] motion to amend [29-1] order denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required to provide a summary of all lay opinion testimony it intends to introduce at trial (signed by Mag. Judge Ronald J. Hedges)n.m. (bl) (Entered: 01/04/2000)
01/10/2000	35	CERTIFICATION of RICHARD H. BROWN in opposition to [32-1] motion to amend [29-1] order denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required

		to provide a summary of all lay opinion testimony it intends to introduce at trial; w/exhibits (femp) (Entered: 01/10/2000)
01/18/2000	36	AFFIDAVIT of PHILLIP OKIN (femp) (Entered: 01/19/2000)
01/18/2000	37	CERTIFICATION of JOHN J. MURRAY JR. in support of [32-1] motion to amend [29-1] order denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required to provide a summary of all lay opinion testimony it intends to introduce at trial; w/exhibits (femp) (Entered: 01/19/2000)
01/21/2000	38	Notice of Intent to submit a Dispositive motion by dft AT&T CORP. (femp) (Entered: 01/24/2000)
01/27/2000	39	Notice of Intent to submit a Dispositive motion by AT&T CORP. (femp) (Entered: 01/28/2000)
01/28/2000	40	Notice of MOTION for summary judgment by AT&T CORP., Motion set for 2/28/00 on [40-1] motion w/certsvc. (Brief/PO Subm) (femp) (Entered: 01/31/2000)
01/28/2000	41	CERTIFICATION of DANIEL H. SOLOMON in support of [40-1] motion for summary judgment; w/exhibits (femp) (Entered: 01/31/2000)
01/28/2000	42	CERTIFICATION of NORIS SOTILLO-SAYERS (femp) (Entered: 01/31/2000)
01/28/2000	43	CERTIFICATION of JOHN J. MURRAY JR. in opposition to [40-1] motion for summary judgment w/separate exhibit A (femp) (Entered: 01/31/2000)
01/28/2000	44	CERTIFICATION of RICHARD H. BROWN in support of [40-1] motion for summary judgment; w/exhibits (femp) (Entered: 01/31/2000)
02/01/2000	45	Minute entry: Proceedings recorded by Ct-Reporter: RIZMAN; Minutes of: 02/01/00; The following actions were taken, granting [32-1] motion to amend [29-1] order denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required to provide a summary of all lay opinion testimony it intends to introduce at trial By Judge Nicholas H. Politan (femp) (Entered: 02/02/2000)
02/02/2000	46	TRANSCRIPT of Proceedings taken on 02/01/00 (Politan) (femp) (Entered: 02/02/2000)
02/22/2000	47	ORDER, vacating [29-1] order denying AT&T's motion for reconsideration; denying AT&T's request that 800 Services be required to provide a summary of all lay opinion testimony it intends to introduce at trial, etc. (signed by Judge Nicholas H. Politan) n/m (femp) (Entered: 02/22/2000)

02/29/2000	48	Minute entry: Proceedings recorded by Ct-Reporter: RIZMAN; Minutes of: 02/29/00; The following actions were taken, setting motion hearing on [40-1] motion for summary judgment by AT&T CORP. for 4/11/00 By Judge Nicholas H. Politan (femp) (Entered: 03/01/2000)
03/23/2000	49	SUPPLEMENTAL CERTIFICATION of RICHARD H. BROWN w/attached exhibits A-C on behalf of AT&T CORP. Re: in support of [40-1] motion for summary judgment (DD) (Entered: 03/23/2000)
04/17/2000	50	Minute entry: Proceedings recorded by Ct-Reporter: MCGUIRE; Minutes of: 04/17/00; The following actions were taken, hearing on [40-1] motion for summary judgment taken under advisement, rule 78 By Judge Nicholas H. Politan (femp) (Entered: 04/19/2000)
08/28/2000	51	OPINION (Copy to NJLJ) (signed by Judge Nicholas H. Politan) (nr) (Entered: 08/29/2000)
08/28/2000	52	ORDER granting deft's AT&T's [40-1] motion for summary judgment; entering judgment for $1,782,649.60 in favor of pltf. 800 SERVICES, INC. and against deft. AT&T CORP.; and dismissing case (by signed by Judge Nicholas H. Politan) (nr) (Entered: 08/29/2000)
08/29/2000		Case closed (nr) (Entered: 08/29/2000)
09/18/2000	53	FINAL JUDGMENT in the sum of $2,237,434.60 {prejudgment int. equals $454,785.00} in favor of deft., AT&T CORP. & against pltf., 800 SERVICES, INC. (signed by Judge Nicholas H. Politan) n/m (DD) (Entered: 09/20/2000)
10/13/2000	54	NOTICE OF APPEAL filed at 4:00 p.m. by (counsel for pltf) 800 SERVICES, INC. Re: [53-1] judgment order . Fee Status: $105.00; Receipt No. 284884. Copies of notice of appeal sent to Clerk, USCA and Attorney(s): FREDERICK LEE WHITMER, JOHN J. MURRAY JR, LAWRENCE S. COVEN (DS) (Entered: 10/16/2000)
10/23/2000		USCA recvd appeal packet 10/19/00 (DS) (Entered: 10/27/2000)
10/23/2000	56	NOTICE of Docketing ROA from USCA Re: [54-1] appeal USCA NUMBER: 00-3519 (DS) (Entered: 10/27/2000)
10/24/2000	55	Transcript Purchase Order RE: [54-1] appeal requesting transcripts of proceedings held on 3/22/99, 2/29/00 and 4/17/00. (jd) (Entered: 10/26/2000)
10/04/2001	57	TRANSCRIPT filed [54-1] appeal for dates of 2/29/00 by Court Reporter Stanley B. Rizman (DS) (Entered: 10/05/2001)
03/08/2002	58	Copy of USCA Memorandum OPINION (jd) (Entered: 03/11/2002)
03/08/2002	59	Certified Copy Of Order from the USCA that the judgments of the District Court entered 8/28/00 and 9/18/00 are hereby confirmed. Costs taxed agst the Appellant. (jd) (Entered: 03/11/2002)

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02/26/2006 12:01:39

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Billable Pages:	4	**Cost:**	0.32

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3519

800 SERVICES INC.,
a New Jersey corporation,

Appellant

v.

AT&T Corp.,
a New York corporation

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 98-cv-01539)
District Judge: Honorable Nicholas H. Politan

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 7, 2001

Before: MANSMANN, ROTH and FUENTES, Circuit Judges

(Memorandum Opinion filed: February 12, 2002)

MEMORANDUM OPINION

ROTH, Circuit Judge:

Plaintiff 800 Services Inc. appeals from the August 3, 2000 Final Order and the subsequent September 18, 2000 interest calculation Order of the United States District Court for the District of New Jersey.

800 Services was an "aggregator" of telecommunications services provided by AT&T. Aggregators pool telecommunications service in order to provide discounted service to their customers. AT&T is a provider of interstate long-distance telecommunications service. The relationship between aggregators and providers is contractual in nature, but the relationship is conducted within the confines of federal law, particularly Title 11 of the Communications Act of 1934; as amended. See U.S.C. 201, et seq. (West 2000). A contract between the parties required 800 Services to compensate AT&T for any shortfall between the anticipated volume of usage and the actual volume of services provided by AT&T.

Plaintiff's complaint advanced twelve counts. The Counts included allegations of unjust enrichment, slander and libel under New Jersey state law, intentional interference with prospective economic advantage and similar interference with contractual relations, unfair competition/trade libel and various claims under 201, 202

and 203 of the Communications Act. AT&T counterclaimed for unpaid telephone usage charges, shortfall charges resulting from contractual obligations and prejudgment interest. The Final Order granted AT&T's motion for summary judgment and awarded judgment on the counterclaim. Our review of a District Court's Final Order to grant summary judgment is plenary. See Nelson v. County of Allegheny, 60 F.3d 1010, 1012 (3d Cir.1995), cert. denied, 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed.2d 213 (1996).

Summary judgment on the allegations under the Federal Communications Act was properly granted by the District Court, as their prosecution was barred by the applicable statute of limitations. Suits under the Communications Act must be filed within two years of "the time the cause of action accrues." 47 U.S.C. 415(b) (West 2000). 800 Services filed its complaint, which alleged violations between September 1990 and July 1995, on April 6, 1998.

800 Services argues, however, that although the most recent alleged violation of the Communications Act occurred more than two years prior to the complaint, the claims are not barred due to the continuing wrong doctrine. The continuing wrong doctrine applies to toll the statute of limitations if there is continuing affirmative wrongful conduct. See Brenner v. Local 514, United Broth. of Carpenters and Joiners of America, 927 F.2d 1283, 1296 (3rd. Cir. 1991); see also 287 Corporate Center Associates v. Township of Bridgewater 101 F.3d 320, 324 (3rd Cir. 1996) (not applying the doctrine when there was no affirmative act by the defendant within the statutory period). The District Court correctly found the doctrine inapplicable in this matter because there was no continuing affirmative wrongful conduct during the statutory two year period prior to 800 Services filing of the complaint.

The District Court also properly granted summary judgement on the state law claims. Under New Jersey Law, slander and libel claims must be brought within one year. See N.J. Stat. ANN. 2A:14-3 (West 2000). 800 Services argues that a six year statute of limitations for trade libel, as opposed to the one year statute of limitations for slander and libel, was applicable. The District Court correctly characterized the statements at issue as slander and libel, not as trade libel. The statements did not constitute trade label since there is no evidence that AT&T made any false statements regarding 800 Services or its affairs. As such, 800 Services' claims sound in slander and libel which are barred by the statute of limitations.

The District Court properly granted summary judgement on the unjust enrichment and tortious interference state law claims as the claims were unsupported by the evidence. To survive a motion for summary judgment, "[t]he non-moving party must make a showing sufficient to establish the existence of each element of his case on which he will bear the burden of proof at trial." Huang v. BP Amoco Corp, 271 F.3d 560, 564. (3rd Cir. 2001); see Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A. To support its unjust enrichment claim, 800 Services alleged that AT&T improperly used its customer lists and profited from such conduct without apportioning profits to 800 Services. The District Court found that 800 Services offered no admissible evidence in support of this contention and that the deposition testimony was based on speculation, conjecture and industry "buzz." Such evidence was properly found insufficient, as it would not carry the burden of proof at trial. Plaintiff's brief on appeal does allege that AT&T would not have been able to switch customers from 800 Services's accounts to AT&T's without abuse of the customer lists. However, the brief does not set forth any causal connection between the customer list abuse and the switching of telecommunications providers. An individual consumer's choice to switch providers could be based on a number of different factors and, therefore, does not necessarily evidence any impropriety on the part of AT&T.

Similarly, the District Court found a lack of evidence in support of 800 Services's tortious interference claims. Although 800 Services presumptively argues on appeal that the business would have continued to flourish but for AT&T's actions, it offers no details to support that contention.

Finally, 800 Services contests the District Court's award of damages under AT&T's counterclaim. The agreement between the parties was controlled by the Tariff No. 2. Tariff No. 2 requires that the aggregator pay the provider for usage and shortfall charges. 800 Services has not contested incurring usage charges or the amounts thereof. Rather, 800 Services claims that AT&T violated an implied covenant of good faith and fair dealing in the contract execution. As discussed above, the District Court found a lack of evidence of slander, libel and tortious interference. Accordingly, we find that the

District Court did not err in awarding damages for unpaid usage and shortfall charges to AT&T. These counterclaim defenses offered by 800 Services mirror the claims offered in the complaint; the defenses similarly lack the requisite evidentiary foundation.

For the reasons above we affirm the District Court.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

By the Court,

/s/ Jane R. Roth
Circuit Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2	)	
	)	
On Referral by the United States Court of Appeals for the Third Circuit	)	Internal File No. CCB/CPD 96-20
	)	
Combined Companies, Inc. and Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc.,	)	
	)	
Petitioners,	)	
	)	
and	)	
	)	
AT&T Corp.,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 2003 **Released: October 17, 2003**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order addresses the Joint Petition for Declaratory Ruling filed by Petitioners Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. (the Inga Companies) and Combined Companies, Inc. (collectively Petitioners). Petitioners' requests for declaratory relief stem from a question referred to us, under the doctrine of primary jurisdiction, by the United States Court of Appeals for the Third Circuit.[1] The question referred by the Third Circuit is "'whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to

[1] *Combined Co., Inc., Winback and Conserve Program, Inc., One Stop Fin. Inc., 800 Discounts, Inc., and Group Discounts, Inc. v. AT&T Corp.*, No. 96-5185 (3d Cir. filed May 31, 1996)(*Third Circuit Opinion*); *see also Combined Companies, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908 (D.N.J. filed May 19, 1995)(*First District Court Opinion*); *Combined Companies, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908 (D.N.J. filed Mar. 5, 1996)(*Second District Court Opinion*).

transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction.'"[2] Interpretation of AT&T's tariff is a matter within this agency's expertise.[3] We conclude that AT&T's tariff did not prohibit such a movement of traffic and thus permitted it. Accordingly, AT&T's conduct was unauthorized and violated section 203 of the Communications Act. We explain our conclusions below.

II. BACKGROUND

2. AT&T is a telecommunications carrier regulated under Title II of the Communications Act of 1934, as amended (the Act). At the time these events occurred, AT&T was a dominant provider of interstate telecommunications services and, as such, offered the services at issue under tariffs, which it filed with the Commission pursuant to section 203 of the Act.[4] The Inga Companies were non-facilities-based aggregator/resellers of AT&T's inbound 800 Wide Area Telecommunications Service (WATS).[5] Prior to June 17, 1994, the Inga Companies completed and signed AT&T's "Network Services Commitment Form" for WATS under AT&T's Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T's regular tariffed rates.[6] The CSTP II was set forth in AT&T's Tariff FCC No. 2 (Tariff).[7] The Inga Companies committed to aggregate $54 million worth of 800 services per year under their nine CSTP II plans.[8] This volume of traffic qualified for a discount of 28 percent off AT&T's regular tariffed rates – a 23 percent discount under the CSTP II plan, combined with an additional 5 percent discount available under the tariffed Revenue Volume Pricing Plan (RVPP).[9] The Inga Companies resold their AT&T's WATS service at a discount off AT&T's tariffed rates to third-party end-users, generally smaller business customers using 800 lines, which could not qualify individually for volume discounts.[10] These small businesses were the Inga Companies' customers.[11] The Inga Companies aggregated these end-users' 800 traffic under the CSTP II/RVPP.[12]

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[2] *See Third Circuit Opinion* at 3 (quoting *First District Court Opinion* at 15).

[3] *See Bell Atlantic-Delaware, Inc., et al. v. Global Naps, Inc.*, File No. E-99-22-R, Order on Reconsideration, 15 FCC Rcd 5997, 6005, para. 22 & n.55 (2000)(and cases cited therein); *rev. denied*, 247 F.3d 252 (D.C. Cir. 2001), *cert denied*, 534 U.S. 1079 (2002).

[4] *See First District Court Opinion* at 2 n.2. Subsection 203(a) of the Communications Act requires every common carrier to file with the Commission "schedules," *i.e.*, tariffs, "showing all charges" and "showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a).

[5] *See Third Circuit Opinion* at 2; *First District Court Opinion* at 3.

[6] Joint Petition for Declaratory Ruling, Internal File No. CCB/CPD 96-20 (filed July 15, 1996) (Petition) at 9; *see* Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration, CCB/CPD 96-20 (filed Aug. 26, 1996) (Opposition) at 4; *First District Court Opinion* at 3-4.

[7] *First District Court Opinion* at 3; *see generally* AT&T Corp. Further Comments, CCB/CPD 96-20 (filed Apr. 2, 2003) (AT&T Further Comments) at Attachment 1 (AT&T Tariff FCC No. 2 at § 3.3.1.Q. (AT&T 800 Customer Specific Term Plan II), 18th rev. p. 61.16 (eff. Dec. 12, 1994), 6th rev. p. 61.16.1 (eff. Mar. 11, 1994), 12th rev. p. 61.17 (eff. Mar. 11, 1994)).

[8] *See First District Court Opinion* at 7, 8 n.8; *cf.* Petition at 11 (Inga Companies committed to a volume of $4 million per month).

[9] *See First District Court Opinion* at 3-5.

[10] *First District Court Opinion* at 3-4.

[11] *See First District Court Opinion* at 3; AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback and Conserve Program, Inc.*, File No. E-97-02, Memorandum Opinion and Order, 16 FCC Rcd 16074, 16075, para. 3 (2001)).

[12] *First District Court Opinion* at 3-4.

3. Section 2.1.8 of AT&T's Tariff FCC No. 2 provided for the transfer or assignment of tariff plans.[13] In December 1994, the Inga Companies and CCI, a new or previously inactive company,[14] executed certain Transfer of Service Agreement and Notification (TSA) forms transferring the nine Inga Company CSTP II/RVPP plans to CCI.[15] They requested that AT&T permit the transfer of these plans to CCI.[16] Although AT&T initially refused to accept the transfer unless CCI provided a deposit of $13,540,000,[17] the transfer ultimately was effected without a deposit, under a May 1995 order of the United States District Court for the District of New Jersey.[18] Thus, CCI was the legitimate transferee of the Inga Companies' CSTP II/RVPP plans and customer of AT&T.[19]

4. AT&T sold inbound and outbound services under Contract Tariff 516 (CT 516) to PSE, an aggregator/reseller unrelated to either the Inga Companies or CCI.[20] With an annual commitment of $4 million, which included 15 million minutes of 800 services per year, the CT 516 discount available to PSE was 66 percent off AT&T's regular tariffed rates.[21] CCI wanted the CT 516 discount, which was significantly larger than that available under its CSTP II/RVPP plans. Accordingly, CCI and PSE jointly executed and submitted to AT&T nine TSA forms for each of the nine plans.[22] At the bottom of each TSA, in handwriting, these parties directed AT&T to move the "traffic only" on each plan to PSE.[23] The January 13 letter, under which these nine TSAs were forwarded, directs AT&T to "move the locations associated with these plans [but] not ... in any way to discontinue the plans."[24] In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSI CSTP II/RVPP plans, but not to move the actual plans themselves.[25] Having refused to recognize the original transfer from the

[13] *First District Court Opinion* at 6; *see* Exhibit I to Petition (AT&T Tariff FCC No. 2 at § 2.1.8 (Transfer or Assignment), 14th rev. p. 20 (eff. Apr. 21, 1994)).

[14] *First District Court Opinion* at 7-8 & n.6; Opposition at 4.

[15] *See First District Court Opinion* at 7.

[16] *See First District Court Opinion* at 7.

[17] *First District Court Opinion* at 7. This constituted one quarter of the companies' annual revenue commitment. *Id.* at 8.

[18] *Combined Companies, Inc., etc. and Winback & Conserve Program, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908, Preliminary Injunction (filed May 19, 1995) (*First Preliminary Injunction*); *see generally First District Court Opinion*. The district court found that section 2.1.8 of AT&T's tariff, which governed the transfer of plans, was not conditioned upon the provision of a deposit and that the Inga Companies had otherwise met the requirements of section 2.1.8. *See First District Court Opinion* at 20-21; *accord* 47 C.F.R. § 61.54(j)(1994)(special rules affecting a particular item must be specifically referred to in connection with such item).

[19] Because the district court ultimately found that AT&T's refusal to accept the transfer from the Inga Companies to CCI was improper and ordered AT&T to accept it, we assume the legitimacy of that transfer, retroactive to the time when it should have occurred.

[20] *See First District Court Opinion* at 4-5; Petition at 10-11. According to the record, PSE "combine[d] outbound calling services with its [800] IWATS resale operations, and thus – presumably – can cater more to the overall needs of the small businesses it services." *First District Court Opinion* at 4-5.

[21] *See First District Court Opinion* at 5; AT&T Contract Tariff FCC No. 516 at § 3 (eff. Oct. 20, 1993).

[22] *First District Court Opinion* at 10; *see* Exhibit H to Petition.

[23] *See First District Court Opinion* at 10; Exhibit H to Petition.

[24] *See* Exhibit H to Petition.

[25] *See First District Court Opinion* at 10.

Inga Companies to CCI, AT&T also refused to move the traffic from CCI to PSE.[26]

5. The Inga Companies and CCI sued AT&T in the United States District Court for the District of New Jersey in February, 1995, alleging violations of the Communications Act in connection with AT&T's refusal to accept the transfer from the Inga Companies to CCI; and refusal to move traffic from CCI to PSE.[27] On plaintiffs' motion for a writ of peremptory mandamus (preliminary injunction) under 47 U.S.C. § 406 (Mandamus to Compel Furnishing of Facilities), the district court entered a preliminary injunction in May 1995, ordering AT&T to accept the first transfer.[28] To determine whether it should also order AT&T to move the traffic from CCI to PSE, the court requested, under the primary jurisdiction doctrine, that the Commission interpret a certain section of AT&T's tariff.[29] Specifically, the district court referred to the Commission "the issue of the transfer of the aforesaid plans and/or their traffic as between Combined Companies, Inc. and Public Service Enterprises of Pennsylvania, Inc. and its compliance or not with the terms of the governing tariff."[30]

6. Neither party brought the primary jurisdiction question to the agency.[31] Instead, the aggregators went back to the district court.[32] On reconsideration, in a March 5, 1996 decision, the district court made its own substantive finding on the previously referred issue.[33] Notwithstanding its intent to "defer to the FCC on the interpretation of the Tariff provisions governing plaintiffs' proposed transaction," but contemplating a Commission ruling favorable to the aggregators, the court entered a preliminary injunction pending outcome of the Commission determination, and ordered AT&T to "recognize the transfer" of traffic between CCI and PSE and to provide service at the CT 516 rates.[34] AT&T appealed the district court's order to the Third Circuit, which, on May 31, 1996, vacated the lower court's March 5 decision as inconsistent with the primary jurisdiction referral, and reordered the parties to bring the issue to the Commission.[35]

7. On July 15, 1996, the aggregators filed a petition with the Commission in which, "based on established Commission practice, policies, and precedents, the plain language of § 203 of the Communications Act of 1934, as amended, F.C.C. Rule 61.54(j), and Sections 201 and 202 of the Act,"

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[26] *First District Court Opinion* at 10. *Compare* Petition at 13 ("Initially AT&T asserted that CCI was not the 'customer of record' for the Plans (based on what the District Court later determined was AT&T's unlawful refusal to accept the Inga Companies' transfer per the TSAs as determined by the District Court), and, hence, had no authority to order the transfer of the traffic under the Plans to PSE's Contract Tariff 561") *with* Opposition at 5 ("AT&T objected on the grounds that Section 2.1.8 did not authorize the transfer of a plan unless the transferee, in this case PSE, assumes the original customer's liability and that the location-only transfer violated the 'fraudulent use' provisions of Section 2.2.4 of its tariff because the transfer had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall and termination charges." (footnote omitted)).

[27] *See generally First District Court Opinion*; Opposition at 5-6.

[28] *First District Court Opinion* at 1, 21; *see First Preliminary Injunction.*

[29] *See First District Court Opinion* at 15-17.

[30] *First Preliminary Injunction*; *see also First District Court Opinion* at 15 ("whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction").

[31] *See Third Circuit Opinion* at 3-4, 6.

[32] *See Third Circuit Opinion* at 3-4, 6.

[33] *See generally Second District Court Opinion.*

[34] *Second District Court Opinion* at 2 n.2, 16; *Combined Companies, Inc., et al. v. AT&T Corp.*, Civil Action No. 95-908, Preliminary Injunction (filed Mar. 5, 1996) (*Second Preliminary Injunction*).

[35] *See Third Circuit Opinion* at 7-8.

they sought declaratory rulings on four issues.[36] By separate cover motion, the aggregators also sought expedited consideration of their petition for declaratory ruling because, they alleged, AT&T was unlawfully billing certain charges to the aggregators' end-users.[37] AT&T filed Comments in Opposition on August 26, 1996, and Petitioners filed Reply Comments on September 23, 1996.[38] On February 13, 2003, the Bureau released a Public Notice inviting comment on two discrete questions that were not squarely addressed by the parties on the prior record.[39] Specifically, the Bureau first asked the parties to "comment on the nature of the relationship, if any, between AT&T and the end-user customers of AT&T's customers, under AT&T's Tariff FCC No. 2 generally, and specifically under the tariff provisions governing the RVPP and CSTP II Plans at issue in this matter."[40] Second, the Bureau asked the parties to "comment on the remedy that AT&T's Tariff FCC No. 2 specifies that AT&T may exercise if AT&T has reason to believe that its customer is violating section 2.2.4.A.2 of that tariff by '[u]sing or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by ... [u]sing fraudulent means or devices, tricks, [or] schemes.'"[41] Comments were filed in response to this Public Notice.[42]

III. DISCUSSION

A. Whether AT&T's Tariff Permitted the Movement of End-User Traffic Without The Plans

8. The district court asked "whether section 2.1.8 [of AT&T's Tariff] permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction."[43] Similarly,

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[36] *See* Petition at 7-8.

[37] Joint Motion for Expedited Consideration of the Joint Petition for Declaratory Ruling, Internal File No. CCB/CPD 96-20 (filed July 15, 1996) (Joint Motion for Expedited Consideration).

[38] *See* Opposition; Joint Reply of Petitioners, CCB/CPD 96-20 (filed Sept. 23, 1996) (Reply).

[39] *Further Comment Requested on the Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2,* Internal File No. CCB/CPD 96-20, Public Notice, 18 FCC Rcd 1887 (2003) (*Second Public Notice*). The deadline for filing further comments was extended twice. *See Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2,* Internal File No. CCB/CPD 96-20, Order, 18 FCC Rcd 3284 (WCB 2003); *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2,* Internal File No. CCB/CPD 96-20, Order, 18 FCC Rcd 5713 (WCB 2003).

[40] *Second Public Notice*, 18 FCC Rcd at 1887.

[41] *Second Public Notice*, 18 FCC Rcd at 1887-88.

[42] *See* Comments of 800 Discounts, Inc., One Stop Financial, Inc., Winback and Conserve Program Inc., Group Discounts, Inc., CCB/CPD 96-20 (filed Apr. 2, 2003); AT&T Further Comments; Comments of Joseph Kearney, CCB/CPD 96-20 (filed Apr. 2, 2003); Comments of Verizon, CCB/CPD 96-20 (filed Mar. 6, 2003); Reply Comments of 800 Discounts, Inc., One Stop Financial, Inc., Winback and Conserve Program Inc., Group Discounts, Inc., CCB/CPD 96-20 (filed Apr. 15, 2003); AT&T Corp. Further Reply Comments, CCB/CPD 96-20 (filed Apr. 15, 2003); *see also* Letter from Alfonse G. Inga to Marlene Dortch, Secretary, FCC (filed Feb. 28, 2003); Letter from Alfonse G. Inga, President, The Inga Companies, to Judith Nitsche and Secretary, FCC (filed Apr. 23, 2003); Letter from Aryeh Friedman, Senior Attorney, AT&T, to Judith Nitsche, Assistant Division Chief, Pricing Policy Division, FCC (filed Apr. 28, 2003); Letter from Alfonse G. Inga, The Inga Companies, to Judith Nitsche and Secretary, FCC (filed May 5, 2003).

[43] *First District Court Opinion* at 15; *see also Third Circuit Opinion* at 3. Similarly, in its ordering clause, the district court questioned whether the transfer of traffic without the CSTP II Plans "compli[ed] or not with the terms of the governing tariff." *First Preliminary Injunction* at 2.

petitioners' first request for declaratory relief asks the Commission to find that "[a]t the time of the attempted transfer ... in or about January, 1995, by CCI to PSE of the end user traffic under the CSTP II plans held by CCI, neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff ... prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated."[44] We conclude that section 2.1.8 of AT&T's tariff did not address or govern CCI's and PSE's request and that its respective tariffs with CCI and PSE permitted the movement of traffic at issue here.

1. Section 2.1.8

9. In court and before the Commission, AT&T argues that section 2.1.8 of Tariff No. 2 did not authorize the transfer of traffic without a plan unless the transferee assumed the original customer's liability.[45] In January 1995, when these events occurred, section 2.1.8 of AT&T's Tariff provided that a customer could transfer "WATS" to a "new Customer" only if the new customer confirmed "in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment."[46] AT&T explains that in this context "WATS" means CSTP II plans.[47] We conclude that section 2.1.8 of AT&T's Tariff did not address – and therefore did not preclude or otherwise govern – the movement of

[44] Petition at 7-8. Tracking the language of section 2.1.8, petitioners refer to the requested movement of traffic from CCI to PSE as a "transfer (assignment)." *See, e.g.*, Petition at 7-8 (Requests No. 1, 3). AT&T uses the term "transfer." *See* Opposition. We find that the relocation of end-user traffic from CCI to PSE would simply have been a movement of traffic from one AT&T aggregator to another. We note that the agreement between CCI and PSE expressly provided for the return of accounts to CCI upon request. *See* Exhibit G to Petition. On a separate point, we note that the deposit provision of AT&T's tariff is not implicated here. In their first and third requests, petitioners seek, *inter alia*, declarations that AT&T had no basis to require a deposit to effect the movement of traffic without the associated plans. *See* Petition at 7-8. AT&T, however, does not argue that any deposit was required to effect the movement of traffic from CCI to PSE and notes that the deposit requirement related to the earlier transfer from the Inga Companies to CCI. *See* Opposition at 9 n.8.

[45] *See* Opposition at 5; *see also First District Court Opinion* at 10.

[46] The full text of section 2.1.8 is as follows –

> Transfer or Assignment – WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, provided that:
> A. The Customer of record (former Customer) requests in writing that the Company transfer or assign WATS to the new Customer.
> B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).
> C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.
> The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s). When a transfer or assignment occurs, a Record Change Only Charge applies (see Record Change Only, Section 3). Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number.

Exhibit I to Petition (AT&T Tariff FCC No. 2, 14th rev. p. 20, (eff. Apr. 21, 1994)).

[47] Opposition at 10.

end-user traffic from one aggregator to another, as CCI and PSE sought to effect in this case.[48] Section 2.1.8 concerned the wholesale transfer of "WATS" (which, according to AT&T itself, means "plans") from one customer to another. As such, its purpose was to maintain intact the balance of obligations and benefits between parties under the tariff when one customer stepped into the shoes of another. Thus, when, in December 1994, the Inga Companies transferred their CSTP II/RVPP plans to CCI, they were required to meet the conditions of section 2.1.8. Here, by contrast, CCI sought to move only the end-user traffic it had aggregated under its CSTP II out of that plan. PSE, in turn, sought to move that traffic into its CT 516. CCI did not seek to transfer the CSTP II/RVPP plans wholesale to PSE. Rather than a single transfer request, here CCI and PSE effectively made two requests: one by CCI to AT&T to decrease its traffic; and another by PSE to AT&T to increase its traffic. CCI and PSE retained the benefits and obligations of their respective agreements with AT&T. We note in this regard that both the forms submitted to AT&T and the agreement between CCI and PSE stated that CCI would continue to subscribe to its existing CSTP II plans.[49] Thus, CCI still would have to meet its tariffed commitments, without the use of the traffic moved to PSE, and AT&T also would remain obligated to CCI under the terms of Tariff No. 2.[50] The moved traffic would be used to meet PSE's CT 516 volume commitments and, once moved, would no longer be associated with CCI's CSTP II. If the traffic were moved away from CCI under Tariff 2, to PSE under Contract Tariff 516, AT&T would get less money for the same traffic – the traffic would be discounted 66 percent instead of 28 percent.[51] Implementing the carriers' request required AT&T only to move traffic – first, out of CCI's CSTP II, and second, into PSE's CT 516. As to whether the carriers' requests were permissible, we note that AT&T's tariffs with these carriers did not prohibit the addition or subtraction of traffic.[52] Accordingly, in response to the district court's question, "whether

[48] Ambiguities in a tariff are to be resolved against the carrier and favorably to customers. *The Associated Press Request for Declaratory Ruling*, File TS-11-74, Memorandum Opinion and Order, 72 FCC 2d 760, 764-65, para. 11 (1979) (citing *Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213, para. 3, *aff'd*, 29 FCC 1205 (1960)).

[49] *See* Exhibits G and H to Petition.

[50] CCI and PSE did agree that the traffic could be returned to CCI upon 30 days written notice from CCI that AT&T required CCI to meet its commitments. *See* Exhibit G to Petition. Accordingly, at least theoretically, the traffic might have been returned to CCI at some point to enable it to meet any CSTP II obligations. *Cf.* Reply at 10 (arguing CCI would receive more net income, and thus have more money available to pay any charges, after the traffic was moved to PSE). We do not speculate whether the traffic ever would have been moved back or whether it or some other development would have satisfied CCI's CSTP II commitments because AT&T did not move the traffic from CCI to PSE.

[51] *See First District Court Opinion* at 5. Exhibit G to the Petition, a letter agreement between CCI and PSE dated January 16, 1995, explains that, once the traffic was moved: (1) CCI's end-users (formerly the Inga Companies' end-users) would "be billed by AT&T at the prevailing AT&T Tariff 2 CSTP rates, less twenty three percent (23%) Customer Specific Term Plan (CSTP) discount, and 5.5% Revenue Volume Pricing Plan (RVPP) discount"; (2) CCI would get 80 percent "earned credit" for this traffic from PSE; (3) CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued); and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required CCI to meet its commitments. *See* Exhibit G to the Petition. Thus, the traffic would be discounted 66 percent instead of 28 percent and the end-users would receive a discount off AT&T's standard tariffed rates greater than the portion of the 28 percent they had received when their traffic was associated with the CSTP II plan. *See First District Court Opinion* at 3-5. The discount differential would be apportioned between CCI and PSE according to their letter agreement. *See also* n.66, *infra.*

[52] *See generally* AT&T Tariff FCC No. 2; AT&T Contract Tariff FCC No. 516. As AT&T concedes, the end-users or "locations," were CCI's customers, not AT&T's. *See* AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); *see also MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them. *See Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion

(continued....)

section 2.1.8 [of AT&T's Tariff] permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction,"[53] we conclude that section 2.1.8 of the tariff did not address or govern the movement of traffic without a plan and that AT&T's respective tariffs with CCI and PSE permitted it.

2. The "Fraudulent Use" Provisions

10. Petitioners' first request for declaratory relief goes beyond section 2.1.8 and asks the Commission to find that "[a]t the time of the attempted transfer ... in or about January, 1995, by CCI to PSE of the end user traffic under the CSTP II plans held by CCI, neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, *nor any other provision of AT&T's Tariff F.C.C. No. 2*, prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated."[54] Here and before the district court, AT&T argues that the proposed "location-only transfer violated the 'fraudulent use' provisions of Section 2.2.4 of its tariff," thus justifying AT&T's refusal to accept the transfer from CCI to PSE.[55] It claims that the transfer from CCI to PSE "had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall ... charges"[56] because CCI's entire revenue stream would transfer to PSE, but PSE would have no corresponding obligation to pay any shortfall charges under the CSTP II.[57] Thus, AT&T argues "if only the traffic on the plans and not the plans themselves were transferred to PSE, *the liability for shortfall . . . charges attendant thereto would then be vested in CCI:* an empty shell."[58] Further, "[w]ithout the revenue generated by the traffic under the plans, CCI would have no income and no means of backing the responsibilities it maintained after the CCI/PSE transfer of traffic."[59] AT&T claims that, based upon statements made by Alfonse Inga, the owner of the Inga companies, it had reason to believe that CCI's proposed transfer was an attempt to avoid liability for shortfall charges under the Tariff.[60] Accordingly, AT&T argues, it had the right under section 2.2.4 to refuse to accept the transfer to PSE.[61]

11. Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – which we do not decide – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE. If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSTP II/RVPP commitments would be associated with PSE's CT 516. Further, CCI (as well as the Inga companies[62]),

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(...continued from previous page)
and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998). Accordingly, AT&T could not refuse to move them out of CCI's CSTP II and into PSE CT 516. The fact that CCI sought to move all of its end-user locations, rather than just one or a few locations, did not confer a right on AT&T where none otherwise existed.

[53] *First District Court Opinion* at 15.

[54] Petition at 7-8 (emphasis added); *see also* n.44, *supra*.

[55] Opposition at 5 (footnote omitted); *see also First District Court Opinion* at 10.

[56] Opposition at 5. Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) is not at issue here. Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.

[57] Opposition at 5, 12.

[58] *First District Court Opinion* at 10 (emphasis added); *see* Opposition at 12.

[59] *First District Court Opinion* at 10; *see* Opposition at 12.

[60] Opposition at 5, 11-12.

[61] Opposition at 5; AT&T Further Comments at 10-11.

[62] *See First District Court Opinion* at 9.

but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans. Once all of its traffic was moved to PSE, CCI might have needed to amass new traffic in order to meet its commitments under its CSTP II plans. AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.

12. Even assuming that AT&T did have reason to believe that the proposed movement of traffic from CCI to PSE violated section 2.2.4 of its tariff, AT&T did not avail itself of the associated remedy that was specified in its tariff. Section 2.2.4, which AT&T cites in support of its argument, was titled "Fraudulent Use" and provided that --

> The fraudulent use of, or the intended or attempted fraudulent use of, WATS is prohibited. The following activities constitute fraudulent use:
>
> A. Using or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by:
>
> . . . .
>
> 2. Using fraudulent means or devices, tricks, [or] schemes ....[63]

Section 2.8.2 of the Tariff, titled "Interference, Impairment or Improper Use," however, specified the remedy that AT&T could employ if it suspected fraudulent use under section 2.2.4.[64] That section provided that –

> The Company may take immediate action to *temporarily suspend service* when a Customer violation results in any of the following:
>
> . . . .
>
> -- circumvents the Company's ability to charge for its services as specified in Section 2.2.4 (Fraudulent Use) preceding . . . .
>
> . . . .
>
> In such cases, the Company will make reasonable effort to give the Customer prior notice *before suspending service*.
>
> . . . .
>
> When a violation results in the temporary suspension of service ... [this] restriction[] will be removed when the Customer is in compliance with the [tariffed] regulations and so advises the Company.[65]

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[63] *See* Exhibit 7 to Reply; Attachment 4 to AT&T Further Comments (AT&T Tariff FCC No. 2 at § 2.2.4 (Fraudulent Use), 11th rev. p. 21 (eff. July 28, 1994), 5th rev. p. 22 (eff. July 28, 1994)); *see also* Opposition at 5, 9-14; AT&T Further Comments at 10.

[64] For purposes of this discussion, we use the term "fraud" to mean the type of conduct described in AT&T's tariff rather than conduct that would meet a legal definition of fraud.

[65] *See* AT&T Further Comments at Attachment 5 (AT&T Tariff FCC No. 2 at § 2.8.2 (Interference, Impairment or Improper Use), 6th rev. p. 44 (eff. July 28, 1994)) (emphasis added); *see also id.* § 2.8.1 ("General – The Company may take immediate action to protect its services or interests when certain regulations contained in this tariff are

(continued....)

AT&T, however, did not temporarily suspend service to CCI. Instead, it simply refused, in perpetuity, to move the traffic to PSE.[66] If AT&T suspected fraud, as it claims, it should have suspended CCI's service.[67] It did not do so. AT&T's refusal to move the traffic was not the tariffed remedy for fraudulent use.

13. Because AT&T did not act in accordance with the "fraudulent use" provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. AT&T does not rely upon any other provisions of its tariff to justify its conduct.[68] Accordingly, we grant Petitioners' first request for declaratory relief and find that, at the time CCI attempted to move to PSE the traffic that CCI had been using to satisfy its CSTP II commitments, neither Section 2.1.8 of AT&T's Tariff FCC No. 2, nor any other provision of AT&T's Tariff FCC No. 2, prohibited it from moving that traffic without the

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(...continued from previous page)
violated. The specific regulations involved and the action(s) which will be taken by this Company are as specified in 2.8.2, 2.8.3 and 2.8.4 following."). We reject AT&T's argument that these provisions authorized AT&T to "suspend the customer's *right to transfer* service." *See* Opposition at 11 n.11 (emphasis added); *see also* AT&T Further Comments at 11. Pursuant to Rule 61.2, titled "Clear and explicit explanatory statements," as in effect in January 1995, "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clean [sic] and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2 (1994). It is a well settled rule of tariff interpretation that "'[t]ariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, for the user cannot be charged with knowledge of such intent or with the carrier's canon of construction.'" *Associated Press Request for a Declaratory Ruling*, 72 FCC 2d at 764-65, para. 11 (quoting *Commodity News Services, Inc. v. Western Union*, 29 FCC at 1213, para. 2). Accordingly, if AT&T intended the term "temporarily suspend service" to mean "permanently suspend the right to move traffic to another Customer" it should have said so. To quote the district court, "Words mean what they say. Rules should not be changed in the middle of the game; and certainly not without notice." *First District Court Opinion* at 21.

[66] This enabled AT&T to continue collecting revenue on the CSTP II traffic aggregated by CCI and at the higher CSTP II rate, rather than the CT 516 rate. Under the billing arrangement between AT&T and petitioners, AT&T billed the end-user directly, calculating into the bill a secondary discount, which the aggregator allotted to the end-user in question. AT&T then paid the aggregator the difference between the aggregator's CSTP II/RVPP discount and the percentage discount allotted to the end-user. The sum remitted by AT&T to the aggregator constituted the aggregator's income, from which it derived its operating costs and profits. *First District Court Opinion* at 4; *see also* Petition at 10. If AT&T had suspended service as its tariff permitted, it would not have collected any revenue at all under these accounts, rather than, as it did, continue to collect under the CSTP II. Although suspension was clearly a less attractive alternative than continuing to collect revenue at the CSTP II rates, suspension was the only remedy available to AT&T under the terms of its tariff for the type of "fraud" AT&T alleges it suspected.

[67] As discussed in n.65, *supra*, Commission Rule 61.2 requires that tariff provisions be explicit. Rule 61.54(j) further required that "[a] special rule, regulation, exception or condition affecting a particular item or rate *must be specifically referred to in connection with such item or rate.*" 47 C.F.R. § 61.54 (1994) (emphasis added). Consistent with these rules, section 2.8 of AT&T's tariff specified the precise remedy to be applied upon the occurrence of different enumerated events. For example, section 2.8.2 provided that when a customer failed to comply with sections 2.2 (Use), 2.7.2.C (Interference and Hazard), 2.7.8.A (Answer Supervision), 2.7.8.D (Customer-provided Communications System Failures), or 2.7.9 (Minimum Protection Criteria), the remedy was to deny requests for additional service and/or temporarily suspend service "on ten days' written notice by certified U.S. Mail to the Customer." *See* AT&T Further Comments at Attachment 5 (AT&T Tariff FCC No. 2 at § 2.8.2, 6th rev. p. 44 (eff. July 28, 1994)). Section 2.8.3 provided for disconnection of service and/or denial of requests for additional WATS in the event of a violation of section 2.5.3, governing nonpayment of charges. *See* Attachment 5 to AT&T Further Comments (AT&T Tariff FCC No. 2, 4th rev. p. 44.1 at § 2.8.3 (eff. Aug. 11, 1994)). Section 2.8.4 permitted AT&T, "immediately and upon written notice to the Customer," to "restrict, suspend or discontinue providing ... service" for violations of section 2.2.3.C or D. *Id.*

[68] *See* Opposition at 10-14; AT&T Further Comments at 3-5, 10-11.

CSTP II plans.[69]

B. Whether a Tariff Revision May Have Retroactive Effect

14. In their second request for declaratory relief, petitioners ask the Commission to find that "[u]nder standard tariffing law, principles, policies, and as required by the plain language of Section 203 of the Act, AT&T had no legal basis and could not have effectively tariffed any changes or additions to Section 2.1.8 or any other published provision of its Tariff F.C.C. No. 2, subsequent to January 1995, which could have substantively affected CCI's right to assign the traffic under its CSTP II plans to PSE in January, 1995."[70] AT&T does not address the retroactive application of tariff revisions.[71] We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern the resolution of this matter. We decline to rule on this request because the issue is moot.

15. The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty."[72] When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court. Resolution of this issue is not necessary to assist the district court. After AT&T refused to permit petitioners to move the traffic, it filed Transmittal 8179 with the Commission in February 1995, which sought to amend Tariff No. 2. The district court's May 1995 primary jurisdiction referral to the Commission was based, in part, upon AT&T's contention that the Commission's consideration of Transmittal No. 8179 would clarify whether CCI was entitled, under the tariff, to move the traffic without the plans to PSE.[73] According to the record, however, AT&T ultimately withdrew Transmittal 8179 on June 2, 1995.[74] Thus, Transmittal 8179 never became effective.[75] Since AT&T did not amend its tariff, our analysis of petitioners' retroactivity question would not assist the court in resolving this matter. Nor does either party explain how consideration of this question would resolve a controversy or remove any uncertainty. The issue is moot and, in our discretion, we decline to address it.

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[69] *See* Petition at 7-8.

[70] Petition at 8.

[71] *See generally* Opposition; AT&T Further Comments.

[72] 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also* 47 U.S.C. §§ 154(i), (j); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir.), *cert denied*, 414 U.S. 914 (1973).

[73] *See First District Court Opinion* at 12, 16-17; *Second District Court Opinion* at 3-4, 13; *see also* Petition at 14-16 & n.7 (quoting AT&T's Brief filed in 1995 with the district court ("Transmittal 8179 ... make[s] explicit AT&T's implicit rights under the tariff. Accordingly, the proceeding in the FCC will resolve that issue ...."). The district court found that *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10th Cir. 1993), was persuasive authority on one of the factors relevant to the primary jurisdiction referral: whether a decision by the court prior to an Commission response to a petition pending before that agency might result in conflicting decisions. *See First District Court Opinion* at 14 n.10; *see also* Petition at 14-15 n.7 (quoting AT&T's Brief filed in 1995 with the district court). A tariff transmittal, however, is a different kind of administrative filing than the petition for declaratory ruling, *see Mical*, 1 F.3d at 1037, that was at issue in the *Mical* case. As we discuss in Section III.C, below, a tariff transmittal is a carrier-initiated document which, if not withdrawn or deferred by the carrier, or suspended or rejected by the Commission, becomes effective, *i.e.*, modifies the tariff, within a certain number of days from the transmittal filing date. *See* 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b). Until the transmittal becomes "effective" it is not part of the tariff. In the interim, the carrier has the power to defer the effective date of a particular transmittal, file an amended version of it, or, as AT&T did in this matter, withdraw it.

[74] *Second District Court Opinion* at 4.

[75] *See Second District Court Opinion* at 4.

C. Whether AT&T was Authorized to Refuse to Permit the Movement of Traffic From One Reseller to Another

16. Petitioners' third request for declaratory relief asks the Commission to find that "[s]ince neither Section 2.1.8 of AT&T's FCC Tariff No. 2, nor any other provision of AT&T's duly published tariff prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated ..., AT&T had no legal basis to refuse to accept the transfer ... of that traffic from CCI to PSE."[76] We agree with petitioners that, because AT&T's tariff did not prohibit the movement of traffic without the plans, AT&T's refusal to move the traffic was unauthorized.

17. In 1995, AT&T, as well as all common carriers of interstate and foreign telecommunications, was required, under section 203 of the Act, to file with the Commission one or more "schedules" of its charges and the classifications, practices, and regulations affecting such charges.[77] With respect to the services at issue in the instant proceeding, this "schedule" was AT&T's Tariff FCC No. 2. Once filed, a tariff is a public document.[78] It defines the terms and conditions upon which a carrier offers and provides services to its customers.[79] Tariffed charges, classifications, regulations or practices may be changed only after notice is given to the Commission and the public.[80] The Commission regulates the substance of tariff provisions and is authorized to suspend or reject the effectiveness of a proposed tariff provision when it believes such provision will violate the Act.[81] When, as here, service is provided pursuant to a filed tariff, the tariff controls the rights and responsibilities of the customer and the carrier, as a matter of law.[82] Thus, the "filed tariff doctrine" requires carriers, as well as their customers, to abide by the terms of the tariff and precludes carriers from acting outside it.[83] As we have discussed above, AT&T's tariff did not prohibit the movement of traffic without CSTP II plans. Assuming that AT&T reasonably suspected "fraudulent use" under section 2.2.4, the remedy under its tariff for the type of fraud it claims it suspected was suspension of service, not refusal to move the traffic. Accordingly, when AT&T availed itself of a remedy not "specified" in its tariff, that action was unauthorized. We grant petitioners' request for declaratory relief that AT&T had no legal basis to refuse to move the traffic from CCI to PSE.

D. Whether AT&T Violated Sections 201, 202, 203 of the Act and Rule 61.54

18. In their fourth and final request for declaratory relief, petitioners ask the Commission to find that "AT&T's refusal to accept such transfer of traffic . . . was, therefore, in violation of AT&T's tariff, its obligations under Section 201, 202 and 203 of the Act and Rule 61.54 of the Commission's rules."[84] In its Opposition, AT&T argues that "disputed material issues of fact concerning Petitioners'

[76] Petition at 8; *see also supra* n.44.

[77] 47 U.S.C. § 203.

[78] 47 U.S.C. § 203(a).

[79] *See, e.g., Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002); *AT&T v. City of New York*, 83 F.3d 549, 552 (2nd Cir. 1996)(citing 47 U.S.C. § 203(a)).

[80] 47 U.S.C. § 203(b)(1).

[81] 47 U.S.C. § 204.

[82] *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (cited in *Brown*, 277 F.3d at 1170; *ICOM Holding Inc. v. MCI WorldCom*, 238 F.3d 219, 221 (2nd Cir. 2001)).

[83] *See AT&T v. Central Office Telephone*, 524 U.S. 214, 222-23 (1998); *MCI WorldCom v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000). The "filed tariff doctrine" has been applied frequently to preclude customers from enforcing alleged carrier promises that are not specified in the tariff. *See, e.g., Central Office Telephone*, 524 U.S. 214; *ICOM*, 238 F.3d at 221-23; *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989).

[84] Petition at 8.

intent to defraud AT&T are at the heart of all four legal issues which CCI is asking the Commission to resolve, and thus preclude a declaratory ruling."[85] Thus, it reasons, if petitioners wish to proceed before the Commission, they are required to do so through a formal complaint with a complete evidentiary record.[86] We agree that declaratory relief is inappropriate for some of the issues raised by petitioners.[87] We disagree, however, with AT&T's contention that *all* of the issues upon which petitioners seek declaratory relief – or the court's primary jurisdiction referral[88] – involve disputed material issues of fact.[89] The language of the tariff is undisputed. It is undisputed that petitioners requested that A&T move end-user traffic from CCI to PSE and it is undisputed that AT&T did not effect that move. These undisputed facts form the basis for our grants of declaratory relief.

19. Within this framework, we consider petitioners' remaining requests for relief. We go no further than petitioners' claim under section 203, because we find it dispositive. Petitioners argue that, under the circumstances of this case, AT&T's refusal to move the end-user traffic from CCI to PSE violated section 203 of the Act.[90] Subsection 203(c) forbids a carrier from employing or enforcing any classifications, regulations, or practices affecting its charges unless they are "specified" in the tariff and makes it unlawful for a carrier to deviate, in the rendition of tariffed services, from the charges, regulations, and practices set out in its filed tariff.[91] We agree that, when AT&T availed itself of a remedy not "specified" under its tariff, it violated section 203 of the Act.[92] As discussed in Section C above, pursuant to section 203, a carrier's tariff controls the rights and obligations of the carrier, which, as

[85] Opposition at 14; *see also* AT&T Further Reply at 7.

[86] *See* Opposition at 14, 19.

[87] For example, petitioners claim that AT&T engaged in unlawful discrimination in violation of section 202 because its consistent practice was to permit aggregators to transfer locations without plans. *See* Petition at 23, 25. Petitioners also argue that AT&T engaged in an unreasonable practice in violation of section 201 because, when it refused to effect the transfer of locations, it enforced an unwritten rule. *See* Petition at 22-23. Petitioners filed voluminous documents with the Commission, many of which also were filed with the district court, which petitioners claim support their theory of the case. AT&T has not attempted to rebut these individual claims, asserting, instead, that the facts regarding these claims are disputed and arguing that declaratory relief is not appropriate when all relevant facts are not clearly developed before the Commission and essentially undisputed. *See Cascade Utilities, Inc., American Telephone and Telegraph Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 8 FCC Rcd 781, 782 para. 11 (CCB 1993) (cited in Opposition at 10 (additional citations omitted)). As noted above, we agree that declaratory relief is inappropriate when the facts are disputed. Accordingly, we deny all requests not specifically granted. In accordance with the discretion allowed us in a declaratory proceeding, moreover, we see no need to attempt to resolve the disputed issues through a formal complaint proceeding before the Commission, as AT&T proposes. Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary. Assuming that further inquiry is appropriate, efficiency favors their resolution in the district court where the evidentiary record already has been developed. That is consistent with petitioners' original choice of forum for this dispute, with petitioner's objective in this proceeding, *see* Reply at i ("Any factual issues which need to be addressed in order to apply the tariff, after the tariff is interpreted by the Commission, can be addressed by the District Court, which has already compiled an extensive factual record in this case"), 14, and with the court's primary jurisdiction referral. The district court proceeding is still pending and the parties have presented evidence in that forum, *inter alia*, in the course of a two-day hearing.

[88] *See* Opposition at 9.

[89] *See* Opposition at 14.

[90] Petition at 22-23, 25-26. Specifically, petitioners argue that AT&T failed to follow its tariff, that it applied and enforced non-tariffed regulations and conditions, and that it failed to tariff the regulations and conditions that it followed. Petitioners argue that this conduct also violates Rule 61.54(j).

[91] 47 U.S.C. § 203(c); *see Central Office Telephone*, 524 U.S. 214.

[92] 47 U.S.C. § 203(c).

a matter of law, is required to abide by the tariffed terms and is precluded from acting outside it.[93] AT&T's tariff did not prohibit the movement of traffic without plans. Thus, when AT&T availed itself of a remedy not "specified" in its tariff, that action violated subsection 203(c). Accordingly, we grant petitioner's request for declaratory ruling that AT&T violated section 203.

20. We do not reach petitioners' remaining claims under sections 201, 202, and Commission Rule 61.54(j) in light of our conclusion that AT&T violated section 203 of the Act.[94] As discussed above, the Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty."[95] In this case, petitioners' requests for declaratory relief arose out of a primary jurisdiction referral, which asked the Commission to interpret a provision of AT&T's tariff. Our interpretation of the tariff coupled with the undisputed facts lead us to conclude that AT&T engaged in conduct unauthorized by its tariff and, accordingly, violated subsection 203(c) of the Act.

IV. CONCLUSION

21. In sum, we conclude that AT&T's tariff did not preclude the movement of end-user traffic from CCI to PSE without the accompanying CSTP II plans. We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus cannot rely upon the fraud sections of its tariff to justify its refusal to move the traffic. Accordingly, we conclude that AT&T's action in refusing to move the traffic was unlawful and violated subsection 203(c) of the Communications Act.

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[93] *See* nn.77-83, *supra*, and accompanying text.

[94] *See also* n.87, *supra*. We also decline to address issues concerning AT&T's shortfall charges in this declaratory proceeding. In the Joint Motion for Expedited Consideration, which was filed on July 15, 1996, petitioners argued that AT&T unlawfully billed shortfall charges to CCI's end users in June of 1996. *Joint Motion for Expedited Consideration of the Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2,* Internal File No. CCB/CPD 96-20, Public Notice, 11 FCC Rcd 8738 (1996); *see also* Joint Motion for Expedited Consideration at 2 (citations omitted). After receiving AT&T's bills for shortfall charges, 190 of CCI's end users sent letters to the Commission in June and early July of 1996. The Consumer Protection Branch of the Enforcement Division of the Common Carrier Bureau informed these end users that their letters would be treated as informal comments in this declaratory ruling proceeding. After the original billing, however, in a letter dated June 27, 1996, AT&T informed CCI's end-users that the shortfall charges would be "transferred to a bill directed to CCI itself." AT&T filed a copy of this letter with the Commission in a section 208 formal complaint proceeding that it filed against petitioner Winback & Conserve in October 1996. *See* Complaint, Exhibit A, Attachment E, *AT&T Corp. v. Winback and Conserve Program, Inc.*, E-97-02 (filed Oct. 25, 1996). Accordingly, we surmise that AT&T made no further attempt to bill or collect these charges from CCI's end-users and therefore conclude that the propriety of imposing shortfall charges on CCI's end-users is a moot issue. *See id.*; *see also AT&T Corp. v. Winback and Conserve Program, Inc.*, 16 FCC Rcd at 16076-77, para. 8. With respect to petitioners' argument that AT&T's CSTP II shortfall charges set forth in Tariff No. 2 are facially unreasonable, we find this issue – which was not referred to us by the district court – to be irrelevant to our conclusion that AT&T violated its tariff. *See* Section B, *supra*; *see also* n.50, *supra.* Finally, we refuse the parties' request that we declare whether "pre-June 17, 1994 CSTP II plans, as are involved here, may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary." *See* Joint Motion for Expedited Consideration at 2; Opposition at 14-15; Reply at 25. Declaratory relief on this issue – which also was not referred to us by the district court – is inappropriate because whether CCI's plans were pre- or post-June 17, 1994 plans is a disputed fact. *Compare id. with* Opposition at 14 n.13.

[95] 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also* 47 U.S.C. §§ 154(i), (j).

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 202, and 203 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, 203, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Joint Petition for Declaratory Ruling of Combined Companies, Inc. and Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. IS GRANTED to the extent set forth herein, and is otherwise DENIED.

23. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Joint Motion for Expedited Consideration of the Joint Petition for Declaratory Ruling IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 12, 2004 Decided January 14, 2005

No. 03-1431

AT&T CORPORATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

On Petition for Review of an Order of the
Federal Communications Commission

David W. Carpenter argued the cause for petitioner. With him on the briefs were *Peter H. Jacoby*, *James F. Bendernagel, Jr.*, *C. John Buresh*, and *Michael J. Hunseder*.

Laurence N. Bourne, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the briefs were *Robert B. Nicholson* and *Steven J. Mintz*, Attorneys, U.S. Department of Justice, *John A. Rogovin*, General Counsel, *Richard K. Welch*, Associate General Counsel, *John E. Ingle*, Deputy Associate General Counsel, and *Rodger D. Citron*, Counsel. *Laurel R. Bergold*, Counsel, entered an appearance.

Before: GINSBURG, *Chief Judge*, and TATEL and ROBERTS, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROBERTS.

ROBERTS, *Circuit Judge*: AT&T Corporation petitions for review of a Federal Communications Commission order interpreting AT&T's tariff on resales of 800 telephone service. A provision of that tariff allows resellers to transfer their business, so long as the recipient assumes all of the transferor's obligations. Based on this provision, AT&T denied one reseller's request to move the "traffic" under its 800 plans to another reseller without a transfer of the corresponding obligations. The Commission interpreted the tariff transfer provision as not addressing the movement of traffic, and ultimately held that AT&T could not refuse the transfer. We conclude that traffic is a type of service covered by the transfer provision, and that the Commission's contrary interpretation would render the provision meaningless. We grant the petition for review.

I.

This case concerns the transfer of toll-free 800 telephone service. At the time of the events in question, AT&T was the dominant carrier of such service, which it provided pursuant to tariffs filed with the FCC. Under the Communications Act of 1934, as amended, and the "filed rate doctrine" incorporated therein, neither the carrier nor its customers could depart from the terms set forth in AT&T's tariffs. *See* 47 U.S.C. § 203(c); *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221–24 (1998); *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003).

The tariff at issue here — AT&T Tariff FCC No. 2 — allowed companies to purchase and resell 800 service to small businesses around the country. The tariff refers to this resale business, as well as the underlying service itself, as Wide Area Telecommunications Service (WATS). Any company could

qualify as a reseller so long as it met the requirements of one of several plans described in the tariff. Companies qualified by aggregating the WATS usage of multiple small businesses into a single plan, and, under the tariff, the companies obtained AT&T's service for these "end-user" businesses at a discounted rate. In return, the reseller or "aggregator" company agreed to meet certain obligations set forth by the carrier, including commitments to purchase a certain volume of use.

In the early 1990s, as other carriers began to acquire a share of the 800 market, the FCC began to loosen its regulation of AT&T. Starting in 1991, the Commission no longer forced the carrier to offer WATS only through the generic plans set forth in Tariff No. 2. Instead, the FCC gave AT&T the option of individually negotiating "contract tariffs" with particular resale companies. As contract tariffs could be drawn to offer discounts greater than those available under Tariff No. 2, many resellers naturally sought to obtain them.

Alfonse Inga, a New Jersey businessman who owned several aggregator companies, was one such reseller. In 1994, Mr. Inga undertook a series of transactions designed to move his business from Tariff No. 2 to a more lucrative contract tariff. First, his companies — each of which operated under CSTP II, a type of plan offered under Tariff No. 2 — transferred all nine of their plans to a new entity, Combined Companies, Incorporated (CCI). As required by Section 2.1.8 of Tariff No. 2, CCI expressly agreed to assume all obligations of the transferor companies. The transfer also stipulated that CCI would pass 80 percent of its profits on to the transferor companies. Second, CCI attempted to negotiate a contract tariff with AT&T. Third, as temporary cover until this envisioned contract tariff became a reality, or as a permanent alternative in case it never did, Mr. Inga planned another transfer — one between CCI and Public Services Enterprises of Pennsylvania (PSE). PSE already had a contract

tariff with AT&T at a substantially larger discount on AT&T's 800 service than that available to CCI under Tariff No. 2.

AT&T resisted this series of transactions. Fearing that CCI would not have the assets to meet its obligations under the transferred plans, AT&T initially refused to implement the first transfer (from the Inga companies to CCI) unless CCI paid a deposit — a requirement not found in Section 2.1.8 of Tariff No. 2. In 1995, the Inga companies and CCI brought suit against AT&T in federal district court in New Jersey, and the court ordered AT&T to drop the deposit requirement and implement the transfer. *Combined Companies, Inc. v. AT&T*, No. 95–908 (D.N.J. May 19, 1995) (unpublished opinion).

Meanwhile, CCI's negotiations for its own contract tariff failed and CCI entered into the second transfer, moving substantially all the 800 service in its CSTP II plans to PSE. As with the first transfer, the CCI-PSE agreement called for PSE to pass much of the realized profit back to CCI. The second transfer, however, differed from the first in an important respect. The parties attempted to structure the transaction to avoid Section 2.1.8 of Tariff No. 2, so that PSE would not have to assume CCI's obligations on the transferred service. To do this, the parties asked AT&T to move just the service to particular end-user businesses — the "traffic" under CCI's plans — and to leave the plans themselves otherwise intact. The parties hoped that, as a result, 800 service would be billed under PSE's substantially lower contract tariff rates, while CCI would remain responsible for the obligations to the carrier under Tariff No. 2.

AT&T balked at this second transfer as well. AT&T maintained that Section 2.1.8 applied to the transaction, and that PSE thus had to assume CCI's obligations in order for the transfer to go through. In addition, AT&T argued that the proposed transfer violated the tariff's "fraudulent use" provisions, as CCI almost certainly would fall short of its volume

commitments once the traffic was moved to PSE's account, and AT&T had reason to believe that CCI would not have sufficient assets to pay the resulting penalties.

The same district court that compelled AT&T to accept the first transfer declined to rule on the second, holding that tariff interpretation issues were within the primary jurisdiction of the FCC. *Id.* at *15. When none of the parties brought the primary jurisdiction matter to the agency, however, the district court went ahead and issued its own decision interpreting the tariff. *See Combined Companies, Inc. v. AT&T*, No. 95–908 (D.N.J. Mar. 5, 1996) (unpublished opinion). The Third Circuit vacated this ruling as inconsistent with the primary jurisdiction referral, and ordered the sides to bring the matter to the FCC's attention. *Combined Companies, Inc. v. AT&T*, No. 96–5185 (3d Cir. May 31, 1996) (unpublished opinion).

The specific question referred to the FCC was "whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction." *Id.* at *3. While the case was pending before the Commission, AT&T entered into a settlement with CCI, extinguishing its WATS plans and releasing all claims between the two parties. Apparently as a result of this settlement, the Commission took no action on the case for seven years. The Inga companies, however, continued to claim damages stemming from AT&T's denial of the CCI-PSE transfer, and in 2003 the Commission finally addressed the Third Circuit referral.

The Commission held that Section 2.1.8 did not govern, and therefore did not preclude, the movement of traffic without attendant obligations. FCC Memorandum Opinion and Order at 6–8. In particular, the Commission reasoned that Section 2.1.8 applied only to the transfer of entire tariffed plans, and not to the transfer of just the traffic component of such plans. *Id.* at 7. The Commission also held that, even assuming the transaction

constituted fraud under the tariff, the tariff did not allow AT&T to remedy such fraud by denying the transfer. *Id.* at 8–10. In light of these holdings, the Commission ruled that AT&T could not refuse the CCI-PSE transfer. *Id.* at 14. The Inga companies, whose involvement in the federal district court action in New Jersey is still ongoing, view the Commission's ruling as entitling them to millions of dollars in damages.

AT&T now petitions for review of the FCC order.

II.

Our inquiry is governed by the Administrative Procedure Act, which requires us to uphold an FCC order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To clear this threshold, the FCC's tariff interpretations must be "reasonable [and] based upon factors within the Commission's expertise." *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001) (citation omitted and alteration in original). Thus, we will reverse the FCC only if its interpretations are "not supported by substantial evidence, or the [Commission] has made a clear error in judgment." *Id.* (same).

The Commission's order in this case is entirely predicated on its determination that Section 2.1.8 of Tariff No. 2 does not apply to the movement of traffic. At the time of the proposed transfer to PSE, that Section read as follows:

> Transfer or Assignment — WATS [Wide Area Telecommunications Service] . . . may be transferred or assigned to a new Customer, provided that:
>
> . . .
>
> B. The new Customer notifies [AT&T] in writing that it agrees to assume all obligations of the former Customer at the time of the transfer or assignment.

The Section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS — the telephone service itself. The new and former Customers referred to are the aggregators, in this case PSE and CCI. Accordingly, any transfer of WATS required PSE to assume CCI's obligations.

AT&T's basic argument before this court is that "traffic," even if it is not the same thing as a tariffed *plan*, is a type of Wide Area Telecommunications *Service* covered by Section 2.1.8. In transferring traffic, the parties sought to reassign particular end-user businesses from CCI to PSE, so that calls to these businesses would be billed under PSE's lower rates. Thus, CCI asked AT&T to transfer the billed telephone numbers (corresponding to individual end-user locations) included in each CSTP II plan. *See* Transfer of Service Agreement Forms. It must be — AT&T argues — that what the parties sought to transfer is a type of service covered by the tariff; that is why they used the Transfer of *Service* forms. *See* AT&T Tariff FCC No. 2, Section 3.1.1 (defining "800 Service and WATS" as "telecommunications services which permit inward and outward calling respectively between a station associated with an access line in one location and stations in diverse geographical service areas specified by the Customer").

The Commission does not respond directly to AT&T's argument. Instead, both in its brief before this court and in its order below, the FCC relies on a statement made by AT&T in comments submitted in the administrative proceeding. There, AT&T noted in passing that "in this case the relevant WATS services are the CSTP II Plans." Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration at 10. The Commission interprets this statement as conceding that Section 2.1.8 can only be triggered by the wholesale transfer of tariffed plans, and not

by the transfer of component parts such as individual billed telephone numbers. *See* FCC Order at 6–7; FCC Br. at 16–18.

AT&T, however, argues persuasively that the FCC misinterpreted its comment. Immediately following the alleged concession, AT&T's submission noted that:

> [Section 2.1.8], by its terms, allows a transfer of CCI's service to PSE only if PSE agreed to assume all obligations under those plans. *Yet CCI explicitly amended the transfer of services form to read "Traffic Only."* By expressly declaring that it did not intend to effectuate a transfer of all obligations under the plans to PSE . . . *the proposed transfer, on its face, violated the terms of Section 2.1.8.*

Comments of AT&T Corp. at 10–11 (emphasis added) (citation omitted). It appears quite clear, then, that AT&T did not concede the inapplicability of Section 2.1.8 to transfers of traffic only. Indeed, had AT&T been willing to make such a concession, it presumably would not have contested the meaning of this provision before the Commission. Accordingly, the FCC's reliance on AT&T's comment is plainly misplaced.

Absent such reliance, the Commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass transfers of traffic alone. The Commission maintains that "[r]ather than a single transfer request, here CCI and PSE effectively made two requests: one by CCI to AT&T to decrease its traffic, and another by PSE to increase its traffic." FCC Order at 7; *see* FCC Br. at 17. But this hardly sheds light on the meaning of the transfer provision. First, AT&T contends that a simultaneous decrease and increase in the respective service of CCI and PSE would in fact not accomplish the same objectives as a transfer of service. AT&T argues that the transfer provision, Section 2.1.8, was included precisely because there are practical benefits to a transfer that would be lost through a transaction of the sort hypothesized by the Commission. These include

guarantees against service interruptions and the loss of particular 800 numbers, as well as exemption from a requirement that resellers obtain their end-users' written consent prior to the transaction. *See* AT&T Br. at 21–23.

Be that as it may, proceeding by analogy does not change the fact that CCI and PSE did request a *transfer* — a transaction on its face at least potentially within the reach of Section 2.1.8, which governs "Transfer or Assignment" — instead of dropping and adding traffic in separate transactions. George Eliot has written that "the world is full of hopeful analogies," MIDDLEMARCH 83 (Penguin Classics 1994) (1872), and this must be one of them, but likening the transfer at issue to a different arrangement, and then analyzing how *that* arrangement would fare under Section 2.1.8, does not advance the FCC's position very far.

In addition, the Commission's failure to grasp AT&T's comment reveals a more fundamental error in its approach. The reason AT&T seemed to equate the transfers in this case with a transfer of plans is that CCI sought to move *virtually all* of the billed telephone numbers in each of its CSTP II plans. Thus, for each of the nine plans, CCI asked AT&T to move all but one, or all but two, of the telephone numbers included in that plan. *See* Transfer of Service Agreement Forms. In so doing, CCI asked AT&T to move nearly all the services — all the benefits — associated with its CSTP II plans. What was left behind were CCI's obligations — the burdens under the plans. Accordingly, even if small scale transfers of traffic were outside the scope of Section 2.1.8, allowing *this* transaction to go through would create an obvious end-run around the unquestioned rule that new Customers had to "assume all obligations" in transferring WATS *plans*. Any reseller could circumvent Section 2.1.8 simply by asking AT&T to move its business one billed telephone number at a time. Using such a scheme, a reseller could move every component of a plan, save its obligations to AT&T. The transfer

provision would then have no effect except in those cases where the transferor foolishly fell within its scope by phrasing its request in terms of the tariffed plans themselves.

The FCC itself recognized that the "purpose" of Section 2.1.8 "was to maintain intact the balance of obligations and benefits between parties under the tariff when one customer stepped into the shoes of another." FCC Order at 7. The Commission's interpretation eviscerates this very purpose, allowing PSE to take up essentially all of CCI's resale business without assuming so much as one of CCI's obligations to AT&T.[1]

As the foregoing discussion indicates, we find the Commission's interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans. In the absence of any contrary evidence, we find that "traffic" is a type of service covered by the tariff. Second, the FCC's interpretation, permitting the movement of benefits without any assumption of obligations, would render the transfer provision meaningless

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[1] The FCC contends that this entire line of argument — challenging the Commission's interpretation as rendering Section 2.1.8 meaningless — is not properly before us, as AT&T did not first present it to the Commission in a petition for reconsideration. FCC Br. at 15 & 19. We disagree. The Communications Act precludes us from addressing only those issues upon which the Commission "has been afforded no opportunity to pass." 47 U.S.C. § 405(a). It does not prevent us from considering "whether the original question was correctly decided," *MCI v. FCC*, 10 F.3d 842, 845 (D.C. Cir. 1993), or whether the FCC "relied on faulty logic." *Nat'l Ass'n for Better Broadcasting v. FCC*, 830 F.2d 270, 275 (D.C. Cir. 1987). The analysis recounted above speaks to the soundness of the Commission's ruling on the question initially presented, and not to any novel legal or factual claims.

even in cases involving the transfer of entire plans, so long as the parties asked the carrier to move all the beneficial plan components rather than the plan itself. The whole purpose of the tariff provision in question was to ensure that benefits could not be transferred without concomitant obligations. It is utterly untenable to contend that the provision does not apply when only benefits are transferred.

In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of "traffic." As this was a threshold determination in the FCC's order, we do not reach the remaining issues addressed by the Commission and argued by the parties before us. We also do not decide precisely which obligations should have been transferred in this case, as this question was neither addressed by the Commission nor adequately presented to us.[2] All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 service without assuming any obligations. The petition for review is granted.

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[2] At oral argument, AT&T's counsel repeatedly stated that Tariff No. 2 expressly required PSE to assume the volume commitments that form the heart of AT&T's concern in this case. *See* Transcript of Oral Argument at 11, 13. In a motion submitted after the argument, however, the Inga companies note that the only obligations enumerated by Section 2.1.8 are "outstanding indebtedness for the service" and "the unexpired portion of any applicable minimum payment period." Intervenors Motion to Clarify and Correct the Facts of the Record at 4. How this enumeration affects the requirement that new customers assume "*all* obligations of the former Customer" (emphasis added) is beyond the scope of our opinion.